(15,540.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 350.

SANTIAGO AINSA, ADMINISTRATOR, WITH WILL ANNEXED, OF FRANK ELY, DECEASED, APPELLANT,

vs.

THE NEW MEXICO AND ARIZONA RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1895.

a In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, Plaintiff,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant.
} Transcript.

Transcript demanded by Selim M. Franklin and Rochester Ford, attorneys for plaintiff, June 8, 1893.

Transcript delivered to Selim M. Franklin and Rochester Ford, attorneys for plaintiff, June 14, 1893.

BREWSTER CAMEREN, *Clerk*,
By CHARLES BOWMAN,
Deputy Clerk.

1 In the First Judicial District Court, Territory of Arizona, in and for the County of Pima.

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Plaintiff,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant.

I.

Plaintiff complains of defendant and alleges:

II.

That plaintiff is a resident of the city of Tucson, county of Pima, Territory of Arizona.

That the said Frank Ely in his lifetime made and published his last will, whereby he appointed Clara D. Ely, Louis B. Ely, and Robert C. Ely executors thereof; that on the 14th day of February, 1890, at the city of St. Louis, State of Missouri, said Frank Ely died.

That on the 24th day of February, 1890, at the said city of St. Louis, said will was proved and admitted to probate in the probate court of the city of St. Louis, in the said State of Missouri; that thereafter and on the 23rd day of November, 1891, at Tucson, Arizona, the said will was proved and admitted to probate in
2 the probate court of Pima county, Arizona Territory; that as the said executors therein named were non-residents of the Territory of Arizona and were not qualified to act as executors in the Territory of Arizona, this plaintiff was, on the 23rd day of November, 1891, duly appointed by said probate court the administrator, with will annexed, of the said Frank Ely, deceased; that thereupon this plaintiff duly qualified and entered upon the discharge of his duties as administrator, and that said letters of administration have not been revoked.

III.

That The New Mexico and Arizona Railroad Company, defendant herein, is a railroad corporation duly organized and existing under and by virtue of the laws of Arizona and doing business in the said county of Pima.

IV.

That plaintiff is the owner in fee of all that certain piece or parcel of land granted by the Mexican authorities to Leon Herreros on the 15th day of May, 1825. Said grant is known as and called the Rancho San Jose de Sonoita, and the land is situated in the Sonoita valley, in the county of Pima, Arizona Territory, about twenty-five miles southeast from the old town of Tubac and some six miles northeast from the Calabasas ranch, in a canyon formed by the slopes of the Santa Rita and the Patagonia mountains. Said land is more particularly bounded and described as follows, according to the calls of the survey of said rancho as made by the Government of Spain on June 26th and 27, 1821, as appears from the expediente or patent to said tract of land, herewith filed and made part of this complaint:

3 Taking as a center the walls of the San Jose de Sonoita mission, there were measured in a northeasterly direction sixty-three Spanish cords, which ended a little below a spring at the foot of some low hills, a chain of mountains of a valley which goes on and turns to the east, where was placed a heap of stones as a monument.

From this monument there were measured to the southeast twenty-five cords, which, going up the valley, ended on the left side of a chain of hills and at the foot of one of them whose slope was covered with oak trees, and on the top was placed a heap of stones as a monument; and on the opposite side there were measured also twenty-five cords on a high white hill, covered with grass, distinguished by this reason from the others near it, which are part of the Santa Rita mountains, and on the top of which hill was placed a heap of stones as a monument.

Returning to the center, the cord was extended in the direction of the east, and there were measured twenty-five cords, ending in a high mountain located on this side on a somewhat high hill covered with many oak trees, where a heap of stones was put in sign of a monument.

Returning to the center, the cord was laid towards the west and twenty-five cords were measured, ending on the main road to Tubac, on a little hill called the "Cazadero," on which was placed a heap of stones as a monument.

Returning to the center, the cord was extended towards the south all along down the canyon, by which there were measured and counted three hundred and twelve cords, that ended in the same canyon at the dropping down of a table-land on the main

4 road at a place called the "First Ford," with the direction looking toward the west, on account of the turn which the said canyon had made, and there was put a heap of stones as a

monument and as heads or corners; there were measured on the right side twenty-five cords to the other side of a ledge that ends in high rolling boulders in a hill that forms a little valley, where I ordered to be placed a heap of stones as a monument; and on the left side there were measured by the surveyors twenty-five cords to the first of two little hills almost exactly alike one to the other, which are named "The Twins," which serves as a monument, as these are distinguished from all the other hills which surround them, and on the summit was placed a cross. This end of the survey, more or less, is about two leagues off from the Calabasas ranch at the nearest place.

And in view of the suggestion made by the claimant to reduce the number of cords actually measured so much as might be calculated to be in fact in excess of the true measurement, by reason of the many turns of the canyon over which the survey was made, as it could not be carried on straight, twenty-five cords were deducted out of the three hundred and twelve cords measured in the last survey down the canyon, the claimant consenting thereto as just. The survey was calculated to be two hundred and eighty-seven cords, with which this survey was finished.

V.

That the above-named defendant claims an estate or interest in and to said above-described land and premises adverse to this plaintiff; that the said claim of the said defendant is without any right whatsoever, and the said defendant has not any estate, right, title, or interest whatever in said lands or premises or any part thereof.

Wherefore plaintiff prays:

First. That the said defendant be required to set forth the nature of its claim, and that all adverse claims of the defendant may be determined by a decree of this court.

Second. That by said decree it be declared and adjudged that the defendant has no estate or interest whatever in or to said lands and premises or in or to any part thereof, and that the title of plaintiff is good and valid.

Third. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land or premises, or to any part thereof, adverse to the plaintiff, and for such and further relief as to this honorable court shall seem meet and agreeable to equity and for his costs of suit.

ROCHESTER FORD AND
SELIM M. FRANKLIN,
Attorneys for Plaintiff.

Endorsed: Filed June 1, at 2.45 p. m., 1892. Brewster Cameron, clerk, by Chas. Bowman, deputy clerk.

6 *Defendant's Entry of Appearance and Stipulation.*

Title of Court and Cause.

It is hereby stipulated and agreed by and between the respective parties in the above-entitled cause as follows:

1. The defendant hereby enters its appearance in the above-entitled cause, waiving service of any process therein.

2. Said defendant shall have ninety (90) days from the date hereof within which to plead to this action.

3. And in consideration of the dismissal as to this defendant, at its request, of a certain action now pending in the above-entitled court, wherein this plaintiff is plaintiff and this defendant and others are defendants, and being the same cause of action as set forth in the complaint herein, which dismissal is for the purpose of giving this defendant additional time to prepare its defense or effect a compromise of this suit, it is further stipulated and agreed that the defendant herein shall, and herein does, waive any right which it may have to plead the statute of limitations as a bar or otherwise to plaintiff's cause of action as set forth in his complaint herein.

And it is further stipulated and agreed that the evidence which may be introduced by plaintiff in the trial of the said cause, which is to be dismissed as to this defendant, shall be deemed and considered and taken as evidence in this cause, in the trial thereof, as though the said evidence had been originally introduced in this cause.

7 SELIM M. FRANKLIN,
ROCHESTER FORD,
Attorneys for Plaintiff.
WILLIAM HERRING,
Attorney for Defendant.

Endorsed: Filed June 4, 1892. Brewster Cameron, clerk, by Chas. Bowman, deputy clerk.

8 *Answer.*

Title of Court and Cause.

The defendant, The New Mexico and Arizona Railroad Company, now comes and answers the complaint of the plaintiff as follows:

This defendant denies that the plaintiff is the owner in fee or otherwise of the premises described in the complaint or of any part thereof.

Denies that said lands were granted by the Mexican authorities to Leon Herreros on the 15th day of May, 1825, or at any other time or at all, or that said lands were surveyed by the government of Spain on June 26 and 27, 1821, or at any time or at all.

Denies that the estate or interest of this defendant in the lands mentioned in the complaint is without any right, or that this de-

fendant has not any estate, right, title, or interest in said lands or in any part thereof.

This defendant alleges that it is the owner and in possession and entitled to the possession of that portion of the lands and premises described in the complaint which constitutes its road-bed, right of way, track, stations, station-houses, and all appurtenances which are held, used, or claimed as its railroad property on and across the said lands in the complaint mentioned and forming part of the New Mexico and Arizona railroad, constructed and operated from Benson, in Cochise county, to Nogales, in Pima county, and this defendant does not claim and never has claimed any estate or interest in any other part or portion of the lands and premises described in the complaint.

9 That its said road-bed, right of way, stations, and all lands forming part of its said railroad property, so far as the same is within the boundary of the lands described in the complaint, was acquired from the owners and occupants thereof, so far as the same was owned or occupied as private property, and as to the remainder thereof the same was public lands of the United States, and said right of way over said public lands was granted and secured to this defendant under and in pursuance of the laws of the United States granting to railroads a right of way over its public lands, and this defendant entered upon said lands and constructed its said railroad thereon in, to wit, the year 1881, and ever since last-mentioned date this defendant has been and still is in the open, notorious, and exclusive possession thereof, claiming, holding, and using the same, and as for the purpose of its said railroad, adversely to all the world, under a claim of right and title thereto, and during all of said time has paid the taxes thereon.

Wherefore this defendant prays to be hence dismissed with its costs, and that the said plaintiff and all persons claiming under him be perpetually enjoined from asserting any right or title to this defendant's right of way, road-bed, stations, station grounds, or other property of this defendant within, upon, or across the said alleged grant, and for such other or further relief as defendant may be entitled to.

WILLIAM HERRING,
Attorney for Defendant.

Endorsed: Filed June 3, 1893. Brewster Cameron, clerk, by Charles Bowman, deputy clerk.

10 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, Plaintiff,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant.
} No. 2096.

Agreed Statement of Facts.

Come now the parties hereto, by their respective counsel, and in accordance with the provisions of paragraph 759 of chapter 11 of title XV of the Revised Statutes of Arizona of 1887, submit this controversy to the court, a jury being expressly waived, upon the following agreed statement of facts, upon which judgment shall be rendered as in other cases; which facts it is stipulated may be taken as though they were offered in evidence in the case, and to be as and for such evidence:

I.

That the following Spanish or Mexican grant was made, executed, and delivered to the grantee named therein at the time and place and by the persons and officials when, where, and by whom it purports to have been signed, made, executed, and delivered, and that the plaintiff herein is the vendee and assignee of and has
11 acquired all the right, title, and interest of the original grantee thereof, and that the following is a correct translation thereof:

12 *Translation.*

Title deeds of a grant of one sitio and three-fourths of another sitio surveyed on behalf of Don Leon Herreros, resident of Tubac, situated in a place called San Jose de Sonoita.

[Seal for the years 1825–1826.]

Juan Miguel Riesgo, commissary general of the treasury, public credit, and war of the State of the Occident:

Inasmuch as article 81 of the royal ordinances of intendentes of December 4th, 1786, confers on these magistrates the power of surveys, sales, and settlements of lands within their respective districts, the purport of which in words is as follows, to wit:

Article 81. The intendentes shall also act as special judges in matters and cases which take place within the limits of their respective provinces in regard to the sale, settlement, and apportionment of the public lands the holders of which and those who desire the acquisition of new grants to them may obtain their titles and formulate their petition before the said intendentes, so that these matters, having consulted with the attorney of the royal treasury, whom they shall appoint, they (the intendentes) shall pass upon and

determine them according to the approval of their customary secretaries, and to receive the appeals of the "junta superior de hacienda," or to report to it in case the intendentes interpose objections, sending along the original documents when they are completed
13 for obtaining title in order that, being examined by it, may return them or grant title, if there be no fault found, or that before issueing the title the proceedings found incomplete may be corrected, whereby *m*reat inconvenience might occur, and the proper confirmation may be made, which the junta superior shall issue in its proper time, as well as the intendente, their substitute and representatives, in conformity to the royal instructions of October 15, 1754, in whatever may not be in contradiction to this, without losing sight of the wise provisions of the laws either in it or that of the laws 9, title 12, libro 4.

In virtue thereof, and proceedings being instituted on behalf of Don Leon Herreros, a resident of the presid-o of Tubac, before the intendente, asking for the lands in a place known as Sonoita, situated in that jurisdiction, his petition was accepted, giving the necessary power to the commander of the company furnishing him with the accompanying writs, and his act of obedient being as follows, to wit:

Sr. intendente governor:

Leon Herreros, resident of the military post of Tubac, with all due respect appeared before you and said that to the east of the said post, about eight leagues distant from it, more or less, is situated a place known as Sonoita, which had been anciently an Indian town and was abandoned by reason of the incursions of the Apache Indians, being situated very near their customary hiding places, and, nevertheless, that even now the locality is exposed to the same danger, having to provide a place to herd some of my cattle and having no lands where to do it, in the royal name of his majesty I locate in the aforesaid place two "sitios" of land, the same
14 which I promise to stock with cattle and horses, being ready to pay to his majesty the just price in which they may be valued.

Wherefore I humbly ask and pray of your honor to order to have the same surveyed, and to institute all the other proceedings necessary to obtain title and the confirmation of the same. I swear that I do not act with a bad intent, and all that is necessary, &c.

For Leon Herreros, JOSE M. SOTOLO.

Arizpe, 29th of May, 1821.

Presentation acknowledged and petition granted without prejudice to third parties. Should any others have a better right, the commander of the company stationed at Tubac shall proceed to the surveying of the land located by the petitioner, summoning adjoining owners. He will appoint experts to appraise the land at its just value, which he will publish for thirty consecutive days, asking bidders, and execute all the proceedings required by law till the "expediente" is completed to a condition to be remitted in proper

order for further proceedings in this special tribunal, so as to issue the corresponding grant.

CORDERO.

Tubac, June 22, 1821.—It is hereby ordered that what is commanded in the foregoing decree by the Brigadier General Cordero, governor and intendente of the province *and* Sinaloa, be carried into effect, and for that purpose, the interested party being notified as well as the adjacent owners, if there be any, and accompanied by the necessary officials, who shall be appointed for the pur-
15 pose, I will proceed to the ancient, abandoned place of Sonoita, in order to survey the two sitios claimed. Don Ygnacio Elias Gonzales, lieutenant commander and subdelegate of the military post of the company of Tubac, to that end I so determined, ordered, and signed, with the assistant witnesses, with whom I act in default of the regular clerks.

YGNACIO ELIAS GONZALES.

Ass't: JOSE M. SOTOLO.
Ass't: PEDRO RAMIEREZ.

Forthwith the said subdelegate proceeded to nominate the legal officials, to wit, the citizen Manuel de Leon, Jose Ma. Sotolo, and Don Jose Monreal, who, upon their oath, promised to perform well and faithfully their mission, and, after taking a general view of the place and the limits of adjacent properties, executed the survey, as appears from the following report:

In the abandoned place of San Jose de Sonoita, on the 26th day of June, 1821, I, the said lieutenant commander and subdelegate of the military post and company of Tubac and its jurisdiction, in order to make the survey of the land claimed by Don Leon Herreros, of the vicinity, delivered to the appointed officials a well twisted and stretched cord, and in my presence was delivered to them a Castilian "vara," on which were measured and counted on said cord fifty regulation "varas," and, this being done, at each end were tied poles, and standing on the spot assigned by the claimant as the center, which was in the very walls of the already mentioned Sonoita, there were measured in a northeasterly direction sixty-three cords, which ended a little beyond a spring at the foot of some low hills, a chain of mountains of a valley which goes on and turns to the east, where was placed a heap of stones as a monu-
16 ment; and, being about to return to the center, the claimant expressed a desire that the survey should be continued down the "cañon" until the two sitios should be completed; that on each side we should survey to him only twenty-five cords, in view that, if the survey should extend further, by reason of the broken-up condition of the country and the rocky hills in sight, such land would be useless to him, saying at the same time, that continuing the measurement along the "cañon" (because it was impossible to go in any other direction on account of the roughness of the ground), by reason of the many turns that had to be made, so many cords should be deducted from the total number measured as would be

calculated to result in excess of the real length measured, taken on a straight line, and considering his demand reasonable I ordered the continuation of the survey as follows, to wit:

From the place where the monument was placed there was measured to the southeast twenty-five cords, which, going up the valley, ended on the left side of a chain of hills and at the foot of one of them whose slope was covered with oak trees, and in the top was placed a heap of stones as a monument, and on the opposite side there was estimated also twenty-five cords on a high white hill covered with grass, distinguished from the others near it, which are part of the Santa Rita mountains, and on the top I ordered a heap of stones to be placed as a monument. In this way the measurement was finished at this end of the survey, with its proper corners and heads. Turning to the center, the cord was measured in the direction of the east, and there were measured and counted twenty-five cords, ending before reaching a high mountain located on this side on a somewhat high hill covered with many oak trees,
17 where I ordered to be put a heap of stones as a monument.

Returning to the center, the cord was laid towards the west and twenty-five cords were measured, ending on the main road to Tubac, on a little hill called the "Casadero," in which was placed a heap of stones as a monument. Whereupon the survey was suspended, as it was late, to continue it tomorrow morning. And to attest it I note it down in the proceeding, which was signed with me by my assistant witnesses and the appointed officers, who could write, and the claimant did not sign because he said he could not write; all of which I certify.

IGNACIO ELIAS GONZALES.
MANUEL LEON.
JOSE M. SOTOLO.

Assistant: IGNACIO ORTIZ.
Assistant: THOMAS ORTIZ.

On the aforesaid place of Sonoita, on the 27th day of the said month and year, I, the said lieutenant commander, in order to continue the survey suspended yesterday, accompanied by the officers appointed, taking as a starting point the place designated as center, the cord was extended towards the south all along down the "cañon," and by which there were measured and counted three hundred and twelve cords, that ended in the same "cañon," upon going down a hill on the main road, at a place called the First Ford, with the direction looking towards the west, on account of the turn which the said "cañon" had made, and there was put a heap of stones as a monument and as heads or corners; there was estimated on the side twenty-five cords to the other side of a ledge that ends in high rolling boulders, in which a hill that forms a little valley, where I ordered to be placed a heap of stones as a monument, and on the left side there was estimated by the surveyors twenty-five cords to the first of two hills almost exactly alike one to the other, which are named The
18 Twins, which serves as a monument, as these are distinguished from all the other hills which surround them, and on the

summit I ordered to be placed a cross. This end of the survey, more or less, is about two leagues off from the Calabassas ranch at the nearest place, and the other end only adjoins with places frequented by the enemies as they come to rob and invade the country, and, in view of the suggestion made by the claimant to reduce the number of cords actually measured, so much as might be calculated to be, in fact, in excess of true measurement, by reason of the many turns of the cañon over which the survey was made, as it could not be carried on straight, I appointed for that purpose Lieutenant Don Manuel Leon and the citizen Don Jose Ma. Sotolo, who were unanimous of the opinion to deduct twenty-five cords out of the three hundred and twelve cords measured in the last survey down the cañon, the claimant consenting thereto as just. The survey was calculated to be two hundred and eighty cords with which this survey was finished, resulting from it one "sitio" and three-fourths of another "sitio" claimed by Don Herreros for raising stock and for farming purposes. Being put in possession and he being satisfied with the said survey, he was admonished that he should at the proper time build up his monument in stone and morter as is provided, and, as he could not write, I signed myself with the appointed officers who could and the assisting witnesses in default of the regular clerk.

YGNACIO ELIAS GONZALES.
MANUEL DE LEON.
JOSE MA. SOTOLO.

Assistant: YGNACIO ORTIZ.
Assistant: TOMAS ORTIZ.

19 Immediately thereafter the commission proceeded to appraise the land which, by the superior regulations laid down on the subject, was valued at one hundred and five dollars for the one sitio and three-quarters of another, and with which value was published thirty consecutive days for bidders. None appearing, the claimant presented himself with the "expediente" at this office, which, by decree of October 21, I sent to the "promotor fiscal," whose answer was as follows, to wit:

Honorable governor intendente:

The "promotor fiscal" of this treasury has examined carefully the expediente of the lands surveyed in favor of Don Leon Herreros, resident of the military post of Tubac, by the commissioner, Don Elias Ygnacio Gonzales, lieutenant commander of the post, in the place called San Jose de Sonoita, in that jurisdiction, from which resulted one sitio and three-fourths of another for raising stock and horses, valued at sixty dollars each sitio, which sums up one hundred and five dollars, as it has running water and some pieces of land fit for cultivation, and, having published the land for thirty consecutive days, there was no bidder to offer over the appraisement, and thereupon the commissioner proceeded to inquire as to the three qualifications required, by which it appeared that the claimant had the means to settle and keep occupation of the land. Wherefore the subscriber

asks if you consider it advisable to order the three publications at this capital calling for bidders, and to auction off the land to the one which offers the highest price, understanding that he will have to pay to the national treasury the whole value of the land, eighteen per cent. for forwarding, two per cent. for the general fund, and three dollars for the officials of the extinguished treasury department, giving him the necessary receipt of credit for the sum total, which must be joined to this "expediente," and send report to the "junto superio de hacienda publico," to be advised as to what it shall determine; nevertheless you may do as you think best.

Arizpe, November 7th, 1821.

FRANCISCO PERES.

And this "commissario general" being satisfied with the foregoing petition, the three publications were made, which took place on the 8th, 9th, and 10th days of November, 1821, the one sitio and three-fourths of another being solemnly auctioned off in favor of the claimant, Don Leon Herreros. Immediately notice of this transfer being added to the original "expediente," it was given to his agent, who, answering in writing he was satisfied with the proceedings, that he should be allowed a settlement with the treasury, and that the corresponding title and confirmation should be issued to his principal.

In virtue whereof the following order was issued:

In the city of Arizpe, on the 12th day of November of the year 1821, the hon. intendente *pro tempore* (interino) of this province of Sonora and Sinaloa, Don Ygnacio Bustamente, having examined the documents of the survey appraisement, publication, auction and sale of the lands of the place called San Jose de Sonoita, situated within the jurisdiction of the military post of Tubac and containing one sitio and three-fourths of another sitio, for raising stock in favor of Don Leon Herreros, of the same place, the answer given by the agent, as it appears by the foregoing instrument, with everything else that was necessary, said that, declaring, as I do declare, the said proceedings to be in good order and form, and allowing, as I now allow, that settlement should be made with the national treasury for the said public lands by the said Don Leon Herreros, I should order that notice be given to his agent to proceed to deliver to the treasury of this city the sum of $116.00 2r. 5gr. in the following fashion: $105.00 as value of said land, $6 1r. 7gr. as land fee, and its 18 per cent., $2 10gr. for the two per cent. for the general fund, and three dollars as fees of the extinguished account of the same treasury. The certificate thereof being inserted in this expediente, the same shall be reported to the "junta superior hacienda" for its approbation or to make such disposition as to them may appear best, and by this instrument he so provided, ordered, and signed with the assisting witnesses in default of the regular clerk, which he has not, as he should, by law.

YGNACIO DE BUSTAMENTE.

Assistant: JOSE MA. MENDOZA.
Assistant: JOAQUIN ELIAS GONZALES.

The agent being notified of this order, he proceeded to make the payment ordained, as appears by the certificate adjoined to the "expediente," in which state it remains in the keeping of the general office (commissario general) as a perpetual record.

Wherefore, using the powers granted to me by the act 81, ordinances of intendentes, and pursuant to the provisions of the Royal Institute of Oct. 15, 1754, which is quoted in the same article, by these presents, in the name of the sovereign nation of Mexico, I grant and confirm title to one sitio and three-fourths of another which has been surveyed in favor of the said Don Leon Herreros, citizen of Tubac, in which district the land is situated, which, by way of sale and as qualified by the provisions of the law, I grant, give, adjudicate, for himself, his sons, heirs, and successors, with all its rights of ingress and egress,
22 uses, customs, servitudes, woods, forests, grasses, waters, watering places for cattle (aberboderos), and other appurtenances, with the condition that he shall occupy and cultivate said land to the utmost of his ability, without allowing it to be totally abandoned for one entire year, and should there be any other person asking to settle upon it, in such event, previous notice being given, it will be sold to the highest bidder, adding the further condition that Don Leon Herreros shall confine himself to his own limits and bounds described in the notes of survey, which should be marked by monuments of stone and mortar, ordering, as I order, the constitutional alcaldes, who are now or will hereafter be acting at the post of Tubac, not to allow the said claimant or his successors to be molested or in any way disturbed in the use and enjoyment of said land, but they shall protect the use and property of the same in the quiet enjoyment of it, in which terms I have ordered and I now order the present title of grant and confirmation in favor of Don Leon Herreros and his successors, previous note of which being taken in the corresponding book, the original shall be delivered to the claimant for his protection and use as proprietor owner in fee and only possessor of said land.

Given in the city of "El Fuertes" on the 15th of May, 1825. Authorized and signed with my hand and sealed with the seal of the "comisario" before witnesses in default of secretary.

JUAN MIGUEL RIESGO.

Assistant: JOSE MA. MENDOZA.
Assistant: ANTONIO APOLATEGUI.

Note of this title take on page 3 of Book No. 2 in this "general comisaria."

23 II.

That the claimant under said grant filed, on December 29, 1879, in the office of the United States surveyor general for the Territory of Arizona, under the provisions of the acts of Congress of July 22, 1854, and July 15, 1870, a petition for the confirmation of said grant, accompanying which was the testimonio of same, the trans-

lation of which is hereinbefore set out, but that said petition or grant was never acted on by Congress, and that at the time of the institution of this suit no proceedings for the confirmation of said grant were pending before any surveyor general of the United States, or before Congress, or before the court of private land claims created under the provisions of the act of Congress of March 3, 1891.

III.

That prior to the commencement of this action certain persons, to wit, John Day, now deceased; Robert V. Bloxton, Henry Brenick, Francis Day, Thomas Driscoll, William Van Ness, William S. Fleming, Christian Foster, William Green, Edward Lambley, Jacob A. Linder, Timothy S. Lambertson, John Mansfield, Frederick Marsh, R. R. Richardson, George W. Stevens, D. A. Sanford, and C. C. Watkins, had entered upon land within the limits of the said grant, which plaintiff claims, as pre-emption or homestead settlers, claiming said lands to be public lands of the United States; that thereafter and before the commencement of this action, by condemnation proceedings against and sundry mesne conveyances from said persons, the defendant acquired and now claims a right of way through said several tracts of land so settled upon, which right of way is within the limits of said grant.

24 IV.

That this statement of facts is for the purpose of this suit only, and nothing hereing agreed upon shall be taken as admitted for or against either of the parties hereto in any other proceeding whatever.

Tucson, Arizona, May 29, 1893.

S. M. FRANKLIN,
ROCHESTER FORD,
Attorneys for Plaintiff.
WILLIAM HERRING,
Attorney for Defendant.

Endorsed: Filed June 5, 1893. Brewster Cameron, clerk, by Charles Bowman, D. C.

Tucson, Arizona, May 29, 1893.

The foregoing statement of facts agreed upon by counsel for both parties hereto is hereby certified as correct.

RICHARD E. SLOAN, *Judge.*

June 8, 1893.

25 (*Minute Entry, June* 3, 1893.)

(Title of Court and Cause.)

Come now all the parties hereto, by their respective counsel, and it appearing to the court from the pleadings and agreed statement

of facts filed by counsel herein that the court has no jurisdiction herein because plaintiff claims title under a certain Spanish or Mexican grant which has not been confirmed by Congress, the said complaint and action are dismissed at plaintiff's cost for want of jurisdiction; to which ruling of the court plaintiff, by his counsel, then and there instantly excepts. (Book J, page 223.)

(*Minute Entry, Same Date.*)

(Title of Court and Cause.)

The plaintiff herein having this day filed his motion for a new trial herein in this cause, and said motion being now fully submitted to the court, and the court, being fully advised in the premises, does deny and overrule said motion; to which ruling of the court the plaintiff excepts and gives notice of appeal to the supreme court from said order and ruling of the court. (Book J, page 224.)

26 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, Plaintiff,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, Defendant.

Motion for a New Trial.

Now comes the above-named plaintiff and moves the court to vacate and set aside the judgment in this action and grant a new trial of said action for the following grounds:

I.

Because the judgment and decision are contrary to the evidence.

II.

Because the judgment and decision are contrary to the law.

III.

Because the court erred in dismissing plaintiff's complaint in this action for want of jurisdiction.

S. M. FRANKLIN,
ROCHESTER FORD,
Attorneys for Plaintiff.

Endorsed: Filed June 3, 1893. Brewster Cameron, clerk, by Charles Bowman, D. C.

27 (Title of Court and Cause.)

This cause having been heard before the court upon the pleadings and agreed statement of facts filed in this cause, and the court hav-

ing considered the same and having heard Messrs. S. M. Franklin and Rochester Ford, for the plaintiff, and William Herring, Esq., for the defendant, and being now fully advised in the premises, finds that plaintiff claims title under a certain Spanish or Mexican grant which has not been confirmed by Congress, and that the court has no jurisdiction therein.

It is therefore considered and adjudged by the court that the plaintiff's complaint and action in this case be dismissed, and that defendant, The New Mexico and Arizona Railroad Company, a corporation, do have and recover from the plaintiff the sum of fifty cents as and for its costs of suit, to be taxed.

Dated Tucson, Arizona, June 6, 1893.

RICHARD E. SLOAN, *Judge.*

(Endorsed:) Filed June 6, 1893. Brewster Cameron, clerk, by Charles Bowman, deputy cl'k.

28 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, Plaintiff,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, Defendant.

Be it remembered that this action came on to be heard in said court on the 3rd day of June, A. D. 1893, and the court having fully considered the agreed statement of facts filed by counsel herein and all the parties hereto being present by their respective counsel, the court doth order and adjudge that the complaint and action be dismissed at plaintiff's costs for want of jurisdiction; to which ruling of the court the plaintiff, by his counsel, then and there instantly excepted, and, having reduced his exception to writing, plaintiff, on this 3rd day of June, 1893, the same being one of the days of the May term of said court and being within ten days of the conclusion of the trial, presents this his bill of exceptions to the judge of said court, praying that the same be by said judge allowed and signed and made a part of the record in this cause; and I, the judge of said court, having submitted such bill of exceptions to the counsel for the defendant in said action and the said bill of exceptions being found to be correct, it is thereupon, on said 3rd day of June,
29 1893, allowed and signed by me, the said judge, and the same is hereby ordered filed with the clerk of said court.

RICHARD E. SLOAN, *Judge.*

Approved:
WILLIAM HERRING,
Attorney for Defendant.

Endorsed: Filed June 3, 1893. Brewster Cameron, clerk, by C. Bowman, deputy clerk.

30 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, Plaintiff,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, Defendant.

Be it remembered that this action came on to be heard in said court on the 3rd day of June, 1893, on plaintiff's motion to set aside the judgment rendered therein, dismissing the complaint and action therein, and to grant a new trial of said action; which motion was in the words and figures following, to wit:

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, Plaintiff,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, Defendant.

31 *Motion for a New Trial.*

Now comes the above-named plaintiff and moves the court to vacate and set aside the judgment in this action and grant a new trial of said action for the following grounds:

I.

Because the judgment and decision are contrary to the evidence.

II.

Because the judgment *are* contrary to the law.

III.

Because the court erred in dismissing plaintiff's complaint in this action for want of jurisdiction.

S. M. FRANKLIN AND
ROCHESTER FORD,
Attorneys for Plaintiff.

Endorsed: Filed June 3, 1893. Brewster Cameron, clerk, by C. Bowman, deputy clerk.

32 And the court, having heard the motion, overruled the same; to which ruling of the court plaintiff, by his counsel, then and there instantly excepted, and, having reduced his exceptions to writing, plaintiff, on this 3d day of June, 1893, the same being one of the days of the May term of said court and being within ten days after the conclusion of the trial, presents this his bill of exceptions to the judge of said court, praying that the same be by said judge allowed

and signed and made a part of the record in this cause; and I, the judge of said court, having submitted such bill to the counsel for the defendant in said action and the said bill of exceptions being found to be correct, it is thereupon, on said 3d day of June, 1893, allowed and signed by me, the said judge, and the same is hereby ordered filed with the clerk of said court.

RICHARD E. SLOAN, *Judge.*

Approved:

WILLIAM HERRING,
Attorney for Defendant.

Endorsed: Filed June 3, 1893. Brewster Cameron, clerk, by C. Bowman, deputy clerk.

33 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Ely, Deceased, Plaintiff,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant.

Assignment of Errors.

I.

That the judgment and decree of the district court is contrary to the agreed statement of facts herein in this, that it appeared from such agreed statement of facts that the defendant had no estate, title, or interest in the lands described in the complaint, and that the plaintiff is the owner in fee thereof.

II.

The court erred in dismissing the complaint in this action and in not rendering its judgment and decree in favor of the plaintiff and against the defendant, as prayed for in said complaint.

III.

The judgment and decree of the district court is against the law.

IV.

The court erred in denying plaintiff's motion for a new trial.

34

S. M. FRANKLIN,
ROCHESTER FORD,
Attorneys for Plaintiff.

Endorsed: Filed June 8, 1893. Brewster Cameron, clerk, by Chas. Bowman, deputy clerk.

35 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

TERRITORY OF ARIZONA, *County of Pima,* } ss:

I, Brewster Cameron, clerk of the above-entitled court, do hereby certify the foregoing to be a full, true, and correct transcript of all the proceedings in the case entitled Santiago Ainsa, administrator, with the will annexed, of Frank Ely, deceased, plaintiff, *vs.* The New Mexico and Arizona Railroad Company, a corporation, defendant, No. 2096, as the same appears from the records and files of my said office.

Witness my hand and the seal of said court this 14th day of June, A. D. 1893.

BREWSTER CAMERON, *Clerk,*
By CHARLES BOWMAN,
Deputy Clerk.

(Endorsed:) Filed June 24, 1893. T. D. Hammond, clerk.

36 In the Supreme Court of the Territory of Arizona.

SANTIAGO AINSA, Administrator, with the Will Annexed, of Frank Aly, Deceased, Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Appellee.

Stipulation.

William Herring, Esq., hereby enters his appearance as attorney for the appellee herein, and, not desiring to file a brief or make an oral argument for such appellee, hereby stipulates with Rochester Ford, attorney for appellant herein, that the above-entitled cause made be taken by the court and decided upon the brief to be filed by appellant herein (a copy of which brief has been received by said William Herring) and the oral argument, if any, which the attorney for the appellant may make.

WILLIAM HERRING,
Attorney for Appellee.
ROCHESTER FORD,
Attorney for Appellant.

(Endorsed:) Filed January 6, 1894. T. D. Hammond, clerk.

37 In the Supreme Court, Territory of Arizona, January Term, 1894.

MONDAY, *January 29th.*

The court met at 2 o'clock p. m.

Present:

His honor Albert C. Baker, chief justice.
" Richard E. Sloan, associate justice.
" John J. Hawkins, " "
" Owen T. Rouse, " "

Clerk J. L. B. Alexander.

Court Crier J. F. Briggs.

United States marshal, by his deputy, Ed. Metcalf.

The following causes were considered and acted upon:

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD CO., a Corporation, Appellee. } No. 376.

This cause having been submitted and by the court taken under consideration, and the court having fully considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court be, and the same is hereby, affirmed with costs.

38 It is ordered that the court stand adjourned until tomorrow at 2 o'clock p. m., January 30th, 1894.

A. C. BAKER,
Chief Justice.

39 In the Supreme Court of the Territory of Arizona, January Term, 1894.

SANTIAGO AINSA, Adm'r, etc., of Frank Ely, Deceased, Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Appellee. } No. 376.

Appeal from the district court, Pima county. Hon. Richard E. Sloan, judge. Affirmed.

Mr. Rochester Ford and Mr. Selim M. Franklin for appellant.
Mr. William Herring for appellee.

Opinion by HAWKINS, *A. J.:*

This was an action filed in the district court of the first judicial district of the Territory of Arizona in and for the county of Pima on the 1st day of June, 1892, to quiet the plaintiff's title to a certain tract of land described in the complaint, known as and called the Rancho San Jose De Sonoita, situate in the Sonoita valley, in Pima

county, Arizona Territory, plaintiff's decedent claiming under a Mexican grant to Don Leon Herreros, dated May 25th, 1825.

40 Defendant claims a right of way through said premises by virtue of certain mesne conveyances from certain persons who had settled on portions of the lands conveyed by said grant, claiming same to be public lands of the United States.

The cause was submitted to the court below on an agreed statement of facts showing (1) the copy of the grant papers and admitting that the same was made, executed, and delivered to the grantee named therein and by the persons and officials when, where, and by whom it purports to have been signed, made, executed, and delivered, and that the plaintiff (appellant) herein is the vendee and assignee of and has acquired all the right, title, and interest of the original grantee thereof. (2.) That claimant under said grant filed on December 29th, 1879, under acts of Congress of July 22d, 1854, and July 15th, 1870, a petition for the confirmation of said grant; that said petition was never acted upon by Congress, and that at the institution of this suit no proceedings for the confirmation of said grant were pending before any surveyor general of the United States or before Congress or before the court of private land claims created by act of Congress of March 3d, 1891.

(3.) That prior to this action certain persons had entered upon land within the limits of plaintiff's grant as pre-emptions or homestead settlers, claiming said lands to be public lands of the United States; that thereafter and before the commencement of this suit, by condemnation proceedings against and sundry mesne conveyances from said persons, the defendant acquired and now

41 claims a right of way through said several tracts of land so settled upon, which right of way is within the limits of the said grant.

And the court held that it had no jurisdiction of the subject-matter of said suit and dismissed plaintiff's complaint.

The record shows that the Mexican grant claimed by plaintiff had not been confirmed by Congress. The question for us to consider seems to be, Can a private claim to land in Arizona under an unconfirmed Mexican land grant be contested in the local courts of justice where no proceedings are pending before Congress, surveyor general of the United States, or the private land court of March 3d, 1891?

Astiazaran *v.* Santa Rita Land and Mining Company, 148 U. S., p. 80, settles the question that no such action could be maintained if the claim had been reported to Congress by the surveyor general if commenced before Congress had acted thereon.

But appellant contends that under the Gadsden treaty complete or perfect titles to land needed no legislative confirmation and the owners of such titles may assert them in the ordinary forms of law upon the documents under which they claim, and cites numerous authorities to support said position, all of which seem to us to be under different treaties and where Congress had given the courts certain jurisdiction.

42 Appellant also contends that the grant under which he claims is a complete and perfect title and vested the fee in the grantee.

Who is to decide this question? Under the treaty Congress seems to have reserved this right to itself. It provided a mode of settling the property rights of claimants of these grants by acts of July 22, 1854, and July 15, 1870, and since by the act of March 3, 1891, 26 Statute at Large, 854.

It was the duty of Congress under the treaty to protect these rights. It could do so itself or delegate the power to the judicial department.

Batteller *v.* Domingues, 130 U. S., 238, and numerous cases therein reviewed.

In the case of grants in the State of California this was done by Congress delegating its power to commissioners by act of March 3, 1851. In New Mexico and Arizona Congress reserved to itself the determination of such claims, par. 8, 10 Statute, 309, 16 Statutes, 304, until it provided act of March 3rd, 1891, 26 Stat., 854.

Appellant wants us to consider his grant as being under the provisions of sec. 8 or, rather, of the first paragraph of sec. 8 of the last-mentioned act—that is, one that was complete and perfect when the U. S. acquired sovereignty, and not under section 6 of said act. Suppose we should do so and order the title quieted and some of the settlers thereon should get the Attorney General to commence an action in the land court against the owner of the grant under said section 8, and that court should hold said grant of no avail, then of what force would our decree be?

43 Congress in providing a remedy for settling these disputed titles has nowhere delegated any authority to these courts to settle same. It has reserved to itself the power of settling such titles, and has delegated its power to the land court.

It is not our province to usurp the functions of the "political department" of the Government (Decroix *v.* Chambers, 12 Wheat., 602) or of its delegate, the private land court. After proper confirmation either by Congress or its land court we could grant the relief asked, and not till then. Why should we treat this grant as valid when it appears from the agreed statement of facts that the executive department has heretofore allowed homestead and pre-emption claimants to enter land embraced therein?

Are we to say that department has been violating a treaty of the United States with Mexico? It was for Congress to pass laws for the enforcement of these treaties with Mexico. It has repeatedly done so. Acts July 22, 1854, 10 Stat., 309; July 15, 1870, 16 Stat., 304; commissioners' act 1851 to settle such titles in California, and, finally, act of March 3rd, 1891, 26 Stat., 854.

If, as the appellant contends, the acts of 1854 and 1870 were repealed by act of March 3rd, 1891, still this last act does not authorize us to settle the title to Mexican land grants. He may still apply to Congress if he does not want to apply to the land court. Congress

must in some way confirm this class of Mexican grants before we have jurisdiction thereof.

Boteller *v.* Domingues, 130 U. S., 238.

44 We must recognize and take judicial notice of the acts of the executive department of the Government in allowing the entry of homesteads and pre-emptions in preference to the unconfirmed title of a Mexican land grant.

The judgment is affirmed.

January 29th, 1894.

JNO. J. HAWKINS,
Associate Justice.

We concur.

A. C. BAKER, *C. J.*
OWEN T. ROUSE, *A. J.*

Endorsed: Filed January 29, 1894. J. L. B. Alexander, clerk.

45 In the Supreme Court of the Territory of Arizona.

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Plaintiff and Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant and Appellee.

Finding of Fact.

In the above-entitled cause the court finds the records to be the same as found by the lower court and as appears in the record of this cause on file herein, and the said findings are hereby adopted as the findings of this court herein.

Done in open court this 30th day of January, A. D. 1894.

A. C. BAKER,
Chief Justice of the Supreme Court of Arizona.

(Endorsed:) Filed February 10th, 1894. J. L. B. Alexander, clerk.

46 In the Supreme Court of the Territory of Arizona.

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Plaintiff and Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant and Appellee.

Application for an Appeal.

The above-named plaintiff and appellant, conceiving himself aggrieved by the final judgment entered on the 29th day of January, A. D. 1894, in the above-entitled action and court against him

and in favor of the New Mexico and Arizona Railroad Company, a corporation, does hereby appeal therefrom to the Supreme Court of the United States, and he prays that his appeal may be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, judgment, and evidence in the case, duly authenticated, may be sent to the Supreme Court of the United States.

ROCHESTER FORD,
Attorney for Plaintiff and Appellant.

And now, to wit, on the 30th day of January, A. D. 1894, being a day of the same term at which the aforesaid judgment was
47 rendered against appellant, the above application having been presented and fully considered, it is ordered that the appeal be allowed as prayed for, and the same is hereby allowed upon the filing of a bond for costs in the sum of five hundred dollars.

A. C. BAKER,
Chief Justice of the Supreme Court of Arizona.

(Endorsed:) Filed February 10th, 1894. J. L. B. Alexander, clerk.

48 In the Supreme Court of the Territory of Arizona.

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Plaintiff and Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant and Appellee.

Affidavits of Value.

S. M. Franklin and Rochester Ford being duly sworn, each for himself say that they are the attorneys for the plaintiff and appellant in the above-entitled action; that they are personally acquainted with that certain piece or parcel of land situate in Pima county, Territory of Arizona, known and called the San Jose de Sonoita rancho or grant and are personally with the portions of said San Jose de Sonoita rancho or grant claimed by defendants as set up in their answers in this cause, and affiants further say that the said San Jose de Sonoita rancho or grant is worth more than the sum of five thousand dollars, exclusive of costs, and that the said portions thereof so claimed by defendants are worth more than the sum of five thousand dollars, exclusive of costs, and that the matter in this action, exclusive of costs, exceeds the sum of five thousand dollars.

49

S. M. FRANKLIN.
ROCHESTER FORD.

[SEAL.] Subscribed and sworn to before me, at Tucson, Arizona Territory, this 7th day of February, A. D. 1894.

B. W. TICHENOR,
Notary Public, Pima Co., A. T.

(Endorsed:) Filed February 10th, 1894. J. L. B. Alexander, clerk.

50 In the Supreme Court of the Territory of Arizona.

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Plaintiff and Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant and Appellee.

Know all men by these presents that we, Santiago Ainsa, as administrator, with will annexed, of Frank Ely, deceased, as principal, and Rochester Ford and Ben. Heney, all of the city of Tucson, Territory of Arizona, as sureties, are held and firmly bound unto the New Mexico and Arizona Railroad Company, a corporation, in the sum of five hundred dollars; for the payment of which sum, well and truly to be paid, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 7th day of February, A. D. 1894.

Whereas the above-named Santiago Ainsa, administrator, with will annexed, of Frank Ely, deceased, has taken an appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the supreme court of the Territory of Arizona:

Now, therefore, the condition of this obligation is such that
51 if the above-named Santiago Ainsa, administrator, with will annexed, of Frank Ely, deceased, shall prosecute his said appeal to effect and answer all costs if he shall fail to make said appeal good, then this obligation shall be void; otherwise to be and remain in full force and virtue.

SANTIAGO AINSA,
Administrator, with Will Annexed, of Frank Ely, Deceased. [SEAL.]
ROCHESTER FORD. [SEAL.]
BEN. HENEY. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Pima, }

Rochester Ford and Ben. Heney being duly sworn, each for himself makes oath and says that they are the persons named in and who executed the foregoing obligation; that they are and each of them is a resident and householder of the said county and Territory, and that each is worth at least the sum of five hundred dollars

over and above all his just debts and liabilities and the exemptions allowed by law.

ROCHESTER FORD.
BEN. HENEY.

Subscribed and sworn to before me, at Tucson, Arizona
52 Territory, this 7th day of February, A. D. 1894.

B. W. TICHENOR,
[SEAL.] *Notary Public, Pima Co., A. T.*

The within bond is hereby approved this the 10th day of February, A. D. 1894.

A. C. BAKER,
Chief Justice of the Supreme Court of Arizona.

(Endorsed:) Filed February 10, 1894. J. L. B. Alexander, clerk.

53 In the Supreme Court of the United States.

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Plaintiff and Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant and Appellee.

Assignment of Errors on Appeal.

I.

That the judgment and decree are contrary to the agreed statement of facts in this, that it appears from such agreed statement that the grant under which plaintiff claims title is a complete and genuine and perfect title in fee needing no confirmation, and that no proceedings for its confirmation were pending before any tribunal, and that all the lands embraced with said grant, including the lands claimed by defendant, are private property of plaintiff.

II.

The court erred in dismissing the complaint in this action on the ground that it had no jurisdiction thereof and in not rendering its judgment and decree in favor of the plaintiff and against the defendant, as prayed for in said complaint.

54 III.

The judgment and decree are against the law.

IV.

The court erred in overruling plaintiff's motion for a new trial, for the reasons therein stated.

S. M. FRANKLIN,
ROCHESTER FORD,
Attorneys for Plaintiff and Appellant.

(Endorsed:) Filed February 10th, 1894. J. L. B. Alexander, clerk.

55 In the Supreme Court of the United States.

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Plaintiff and Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant and Appellee.

UNITED STATES OF AMERICA, *ss:*

To the New Mexico and Arizona Railroad Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, on the second Monday of October, eighteen hundred and ninety-four, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Arizona, wherein Santiago Ainsa, administrator, with will annexed, of Frank Ely, deceased, is appellant and The New Mexico and Arizona Railroad Company, a corporation, is appellee, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 10 day of February, A. D. 1894.

[Seal Supreme Court of Arizona.]

A. C. BAKER,
Chief Justice of the Supreme Court of Arizona.

Attest: J. L. B. ALEXANDER, *Clerk.*

Due and legal service of the within citation acknowledged this 16th day of February, 1894.

WILLIAM HERRING,
Attorney for the New Mexico and Arizona R. R. Co., a Corporation.

[Endorsed:] No. 376. United States Supreme Court. Santiago Ainsa, adm'r, etc., appellant, *vs.* The N. M. & A. R. R. Co., appellee. Citation. Filed Feb'y 26th, 1894. J. L. B. Alexander, clerk. S. M. Franklin, Rochester Ford, attorneys for appellant.

56 In the Supreme Court of the Territory of Arizona.

SANTIAGO AINSA, Administrator, with Will Annexed, of Frank Ely, Deceased, Plaintiff and Appellant,
vs.
THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, a Corporation, Defendant and Appellee.

To William Herring, Esq., attorney for defendant and appellee:

You will please take notice that we have taken an appeal from the judgment of the supreme court of the Territory of Arizona in the above-entitled action to the Supreme Court of the United States, and that we have filed the affidavits of S. M. Franklin and Rochester Ford with the supreme court of the Territory of Arizona, to the effect that the matter in dispute exceeds in value the sum of five thousand dollars, exclusive of costs.

S. M. FRANKLIN,
ROCHESTER FORD,
Attorneys for Plaintiff and Appellant.

Service of copy of the within notice acknowledged this 16th day of February, A. D. 1894.

WILLIAM HERRING,
Attorney for N. M. & A. R. R. Co.

[Endorsed:] No. 376. Santiago Ainsa, adm'r, etc., appellant, *vs.* The N. M. & A. R. R. Co. Notice. Filed Feb'y 26th, 1894. J. L. B. Alexander, clerk. S. M. Franklin, Rochester Ford, attorneys for appellant.

57 UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

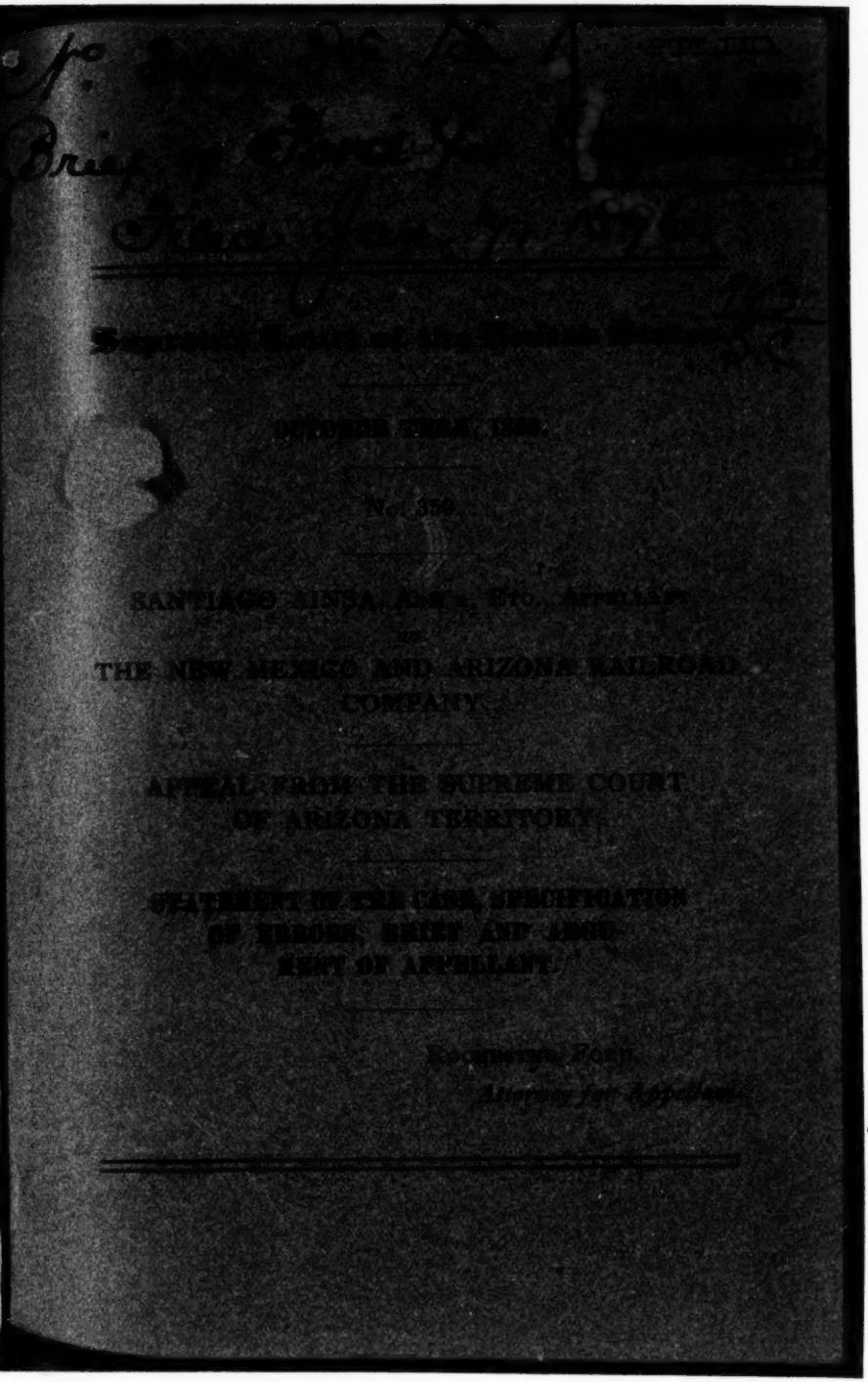
I, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify that the above and foregoing is a full, true, and correct transcript and copy of the record and proceedings in the cause entitled Santiago Ainsa, administrator, with will annexed, of Frank Ely, deceased, appellant, against The New Mexico and Arizona Railroad Company, a corporation, appellee, as the same appears of record and on file in my office; also that the citation herewith and hereunto attached is the original citation issued by said supreme court of the Territory of Arizona.

In witness whereof I have hereunto set my hand and affixed the official seal of said supreme court, this 14th day of March, A. D. 1894, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

J. L. B. ALEXANDER, *Clerk.*

Endorsed on cover: Case No. 15,540. Arizona Territory supreme court. Term No., 350. Santiago Ainsa, administrator, with will annexed, of Frank Ely, deceased, appellant, *vs.* The New Mexico & Arizona Railroad Company. Filed March 26th, 1894.



OCTOBER TERM, 1898.

No. 350.

SANTIAGO ARNA, Adm'r, Etc., APPELLANT,

vs.

THE NEW MEXICO AND ARIZONA RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF ARIZONA TERRITORY.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANT.

Edmund Ford,

Attorney for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 350.

SANTIAGO AINSA, Adm'r, Etc., Appellant,

vs.

THE NEW MEXICO AND ARIZONA RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF ARIZONA TERRITORY.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANT.

STATEMENT OF THE CASE.

This case was instituted by the filing, on June 1, 1892, in the district court of the first judicial district of the Territory of Arizona, in and for the county of Pima, of the complaint set out in the record, in which plaintiff alleged that defendant was a railroad corporation duly organized and existing; that plaintiff as administrator was the owner in fee of that piece of land known as the rancho San José

de Sonoita, granted by the Mexican authorities on May 15, 1825, to one Leon Herreros, which rancho or grant was fully described in the complaint. Plaintiff further alleged that defendant claimed some estate or interest in said land adverse to plaintiff, but that such claim was without right, and prayed for a decree adjudging plaintiff's title to be good and valid. The complaint is the same as the one passed on by this Court in Ely *v.* New Mexico and Arizona Railroad Co., 129 U. S. 291.

Defendant answered claiming a right of way through said premises by virtue of conveyances from certain owners or occupants of said lands.

A jury was waived and the case was submitted to the court on an agreed statement of facts, in which the parties stipulated as follows:

1. That the following Spanish or Mexican grant was made, executed and delivered to the grantee named therein at the time and place and by the persons and officials when, where and by whom it purports to have been signed, made, executed and delivered, and that the plaintiff herein is the vendee and assignee of and has acquired all the right, title and interest of the original grantee thereof, and that the following is a correct translation thereof (which translation appears in full in the record).

2. That the claimant under said grant filed on December 29, 1879, in the office of the United States Surveyor General for the Territory of Arizona, under the provisions of the acts of Congress of July 22, 1854, and July 15, 1870, a petition for the confirmation of said grant, accompanying which was the testimonio of same (the translation of which is hereinbefore set out), but that said petition or grant was never acted on by Congress, and that at the time of the institution of this suit no proceedings for the confirmation of said grant were pending

before any Surveyor General of the United States, or before Congress, or before the Court of Private Land Claims created under the provisions of the act of Congress of March 3, 1891.

3. That prior to the commencement of this action certain persons had entered upon land within the limits of the said grant under which plaintiff claims, as preëmption or homestead settlers, claiming said lands to be public lands of the United States; that thereafter, and before the commencement of this action, by condemnation proceedings against sundry mesne conveyances from said persons the defendant acquired and now claims a right of way through said several tracts of land so settled upon, which right of way is within the limits of the said grant.

On this agreed statement the territorial district court held that it had no jurisdiction, and dismissed the complaint and action for want of jurisdiction. An appeal was taken to the Supreme Court of Arizona, which court found the facts to be the same as found by the lower court and adopted the same as its findings, and affirmed the judgment, 36 Pac. Rep., 213. Plaintiff appealed to this court.

SPECIFICATION OF ERRORS.

I.

The court erred in dismissing the complaint in this action and in rendering judgment for defendant instead of for plaintiff.

II.

The court erred in rendering its judgment dismissing the complaint, because it appears from the agreed statement of facts herein that defendant had no estate, title or interest in the lands described in the complaint, and that plaintiff is the owner in fee thereof.

POINTS AND AUTHORITIES.

I.

The Gadsden treaty, under which the land in controversy was acquired from Mexico, adopts as article 5 all the provisions of the ninth article of the the treaty of Guadalupe Hidalgo, which ninth article is the same as the third article of the treaty of Paris, April 30, 1803, and is as follows:

"The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the

mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

II.

Under this provision of the treaty complete or perfect titles needed no legislative confirmation, and the owners of such titles may assert them in the ordinary forms of law upon the documents under which they claim.

U. S. *v.* Pillerin, 13 How. 9.
U. S. *v.* McCullagh et al., 13 How. 215.
U. S. *v.* Roselius et al., 15 How. 36.
Fremont *v.* U. S., 17 How. 541, 553.
Maguire *v.* Tyler, 8 Wall. 650.
Trenier *v.* Stewart, 101 U. S. 797.
U. S. *v.* D'Auterieve et al., 15 How. 14.
Dent *v.* Emmeger, 14 Wall. 306.
Strother *v.* Lucas, 12 Pet. 410.
U. S. *v.* Arredondo, 6 Pet 691.
Murdock *v.* Gurley, 5 R (Louisiana) 457.
Prevost *v.* Greenaux, 19 H (Louisiana) 1.
Jewell *v.* Porche, 2 A (Louisiana) 148.
Hancock *v.* McKinney, 7 Tex. 384.

III.

The grant under which plaintiff claims title is such a complete and perfect title, and vested the fee in the grantee.

See language of title-paper.
U. S. *v.* Turner, 11 How. 663.

U. S. *v.* Watkins, 97 U. S. 219.

Carpentier *v.* Montgomery, 13 Wall. 480, 493, 494.

U. S. *v.* Knight's adm'r, 1 Black, 227.

Phelan *v.* Poyorena, 13 Pac. Rep. 681.

U. S. *v.* Pico, 5 Wall. 538.

Malarin *v.* U. S., 1 Wall. 282.

U. S. *v.* Pacheco, 22 How. 225.

Cameron *v.* U. S., 148 U. S., 301.

IV.

Under the eighth section of the act of March 3, 1891, establishing the Court of Private Land Claims, holders of complete or perfect titles are given the privilege of presenting their titles to that court or refusing to do so at their option, and no penalty is provided or statute of limitation established as to perfect titles not so presented.

See eighth section of the act.

ARGUMENT.

The substantial question in this case is, Can one who is conceded to be the owner of a piece of land granted by Mexico under the Gadsden purchase by what is claimed to be a complete and perfect title in fee, bring suit in the court of ordinary jurisdiction to quiet his title before his grant is confirmed and while no proceedings for its confirmation are pending?

The lower court held that he could not, but the very many cases decided by this Court under the treaty of Paris, the Florida purchase, the treaty of Guadalupe Hidalgo, the Gadsden purchase and the Alaska purchase

announce principles which, it is believed, show in the clearest manner that such holding is erroneous.

The position which it will be attempted to maintain in this argument is based on the following propositions:

1. That the decisions of this court on the third article of the treaty of Paris are directly applicable to the ninth article of the treaty of Guadalupe Hidalgo and the fifth article of the Gadsden treaty, because these provisions of the treaties are identical.

2. That this suit could have been maintained under the treaty of Paris, and can therefore be maintained now, because

3. Although Congress may by legislation violate treaty obligations and the courts cannot review such action, it has never by any act attempted to disregard the above-cited treaty provisions, and the standing of plaintiff in this action is the same as that of the owner of land by a complete and perfect title under the treaty of Paris.

1. The first of these points is self-evident. The Gadsden treaty contains the above quoted third article of the treaty of Paris as fully as though it were set out therein in so many words.

2. Could this suit have been maintained under the Paris treaty as that treaty has been construed by this Court? It seems that there can be no doubt as to this. The cases on this point in this Court are clear, numerous and consistent.

In carrying out the Louisiana treaty Congress passed the acts of 1824 and 1844, which gave the District Courts of the United States an equitable jurisdiction to confirm inchoate and incomplete titles, but, as repeatedly held by this Court, the District Courts had no jurisdiction conferred upon them over perfect titles. The cases of U. S. *v.* Pillerin and U. S. *v.* McCullagh, *supra*, give a history of this legislation.

The situation under the Louisiana treaty was, therefore, that the District Courts of the United States were given jurisdiction over inchoate or incomplete titles, but no legislation of any kind was passed regarding perfect titles.

The question which is decisive of this case is, In the absence of any legislation as to perfect titles, how did they stand under the Paris treaty and by virtue of it alone? This question is answered in the series of cases cited under the first point of this brief. Thus, in U. S. *v.* Pillerin, *supra*, this Court said:

"Such a title (i. e., a complete or perfect one), is protected by the treaty, and is independent of any legislation by Congress, and requires no proceeding in a court of the United States to give it validity."

Again in U. S. *v.* McCullagh, this Court said, referring to a grant which purported to convey a legal as contradistinguished from an equitable title:

"In this case all the questions upon which the title of the appellees depend are strictly legal questions, to be decided in a court of law in a suit at law. They are not, therefore, within the equity jurisdiction given by the acts of 1824 and 1844. There are no equitable consideration involved in the controversy; and the validity or invalidity of this claim can be tried and determined in any court having competent jurisdiction to try and decide a disputed title to land between individual claimants. There was no necessity, therefore, for any special jurisdiction to try them."

In U. S. *v.* Roselius, 18 How. 30, at p. 34, the Court said:

"If the grant was a complete title, then no act on the part of the American government was required to give it additional validity, as the treaty of 1803, by which Louisi-

ana was acquired, sanctioned perfect titles; nor was jurisdiction vested in the district courts to adjudge the validity of perfect titles."

In the same case, at page 36, the Court said:

"Now the title set up by the petitioner is a complete legal title; and if he can establish the facts stated in his petition, his title is protected by the treaty itself, and does not need the aid of an act of Congress to perfect or complete it. * * * We shall dismiss it (the petition) without prejudice to the legal rights of either party; leaving the petitioner at liberty to assert his rights in any court having competent jurisdiction to decide upon the validity or invalidity of the complete and perfect title set up in his petition."

In Fremont *v.* U. S., the Court said, referring to the Louisiana treaty and the legislation of 1824 and 1844:

"If the party claims to have obtained from either of the former governments a full and complete title, he was left to assert it (under the Louisiana treaty) in the ordinary forms of law upon the documents under which he claimed."

And in Maguire *v.* Tyler the language is:

"Complete titles to land in the territory ceded by France to the United States under the treaty concluded at Paris on the 30th of April, 1803, needed no legislative confirmation, as they were fully protected by the third article of the treaty of cession."

So again, in U. S. *v.* D'Auterieve et al., 15 How. 14, at page 24:

"The title is a complete and perfect one. The place to litigate it is in the local jurisdiction of the state by the common law action or ejectment or such other action as may be provided for the trial of the legal titles to real estate."

In Trenier *v.* Stewart, 101 U. S. 797, the language of this Court is:

"Complete titles in Louisiana, of which there were a few, mostly derived from the dominion of the French, needed no confirmation, as they were fully protected by the treaty."

Quoting from Dent *v.* Emmeger, 14 Wall. 308:

"Titles which were perfect before the cession of the territory of Louisiana to the United States continued so afterwards, and were in no wise affected by the change in sovereignty. The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provisions upon the subject. According to that code a change of government was never permitted to affect preëxisting rights of private property. Perfect titles are as valid under the new government as they were under its predecessor."

In Strother *v.* Lucas. 12 Pet. 410, at page 438, this Court said, citing the cases:

"Without it (the provision of the treaty) the title of individuals would remain as valid under the new government as they were under the old; and those titles, at least so far as they were consummate, might be asserted in the courts of the United States independently of this article."

In the Arredondo case, 6 Pet. 689, 741, the doctrine was announced as clearly:

"The proprietors (of perfect grants) could bring suit to recover them without any action of Congress, and any question arising would be purely a judicial one."

The Louisiana court in Murdock *v.* Gurley 5 R 457, and Riddle *v.* Ratcliff, 8 A 106, said:

"A grant, complete under the French or Spanish government, required no confirmation to give it validity under ours. The former government had no legal power or discretion over it, and none passed to the United States under the treaty. It was and has remained private property, which no legislation of Congress could affect."

The same court said in Prevost *v.* Greenaux, 19 H, 1:

"A treaty of the United States with a foreign power cannot divest any rights of property vested before its ratification."

In another case before the same court, Jewell *v.* Porche, 2 A 148, the court said:

"A United States patent for land patented by Spain before the change of government is as to those claiming under the Spanish title an absolute nullity." "The title of the defendant (who claimed under the Spanish title," the court goes on to say, "was placed by the treaty of cession beyond the reach of the constitutional powers of Congress, and the patent issued by the United States in favor of the plaintiffs is, so far as the rights of defendant are involved, an absolute nullity."

The same doctrine is announced by the Supreme Court of Texas in Hancock *v.* McKinney, 7 Tex. 384, and the very many cases following it. This Hancock *v.* McKinney case was cited and approved by this Court in Gonzales *v.* Ross, 120 U. S., 605, at page 626. This Texas case is submitted as directly in point.

It is not necessary to cite further authorities. The above establish beyond room for doubt that under the Louisiana treaty and the legislation following it, the owner of a complete title could, without any proceedings in the nature of confirmation, litigate it in the courts like any other land owner.

Inasmuch as the language of the Gadsden purchase and the Louisiana treaty are, as above shown, the same, it follows by direct inference from the above authorities that the plaintiff in this case can litigate his title in the courts provided two things are true, first, that it is a complete and perfect title, and, second, that the legislation enacted to carry out the Gadsden treaty is the same in legal effect as the legislation after the Louisiana treaty.

If a perfect title under the Gadsden treaty can be shown to be in the same condition as a perfect title under the Louisiana treaty, then, of course, the above authorities are controlling precedents.

As to the first of these requirements, the fact that plaintiff alleges in his complaint that he owns the grant in fee is a sufficient allegation, so far as the question of jurisdiction is concerned, that the grant is a complete or perfect one, but it also appears from the grant itself as set out in the record that it is a complete title. This Court held in the latest case on the subject, U. S. *v.* Chaves, decided November 11, 1895, reviewing the earlier cases, that where countries have been acquired by the United States its courts take judicial notice of the laws which prevailed up to the time of such acquisition. They are not, as to such countries, foreign laws but laws of an antecedent government. This Court held, also, in U. S. *v.* Turner, *supra*, that whether an instrument constitutes a complete and perfect title by the laws of Spain is a question for the court. It is a matter of history, of which this Court can take judicial notice, that the grants made in the old intendencia of the Spanish government embracing the provinces of Sonora and Sinaloa were grants by metes and bounds for a moneyed consideration, and were perfect executed contracts of sale. The cases cited under point II. of this brief show what a perfect grant title was, and this grant so clearly fulfils every requirement that no extended argument is necessary on this point. It cannot be contended that the grant does not convey a complete title.

The language presents every link in the chain of a perfect testimonio. The terms of the granting part are conclusive, for they recite that "the original shall be delivered to the claimant for his protection and use as proprietor, owner in fee and only possessor of said land." In More *v.* Steinbach, 127 U. S., *supra*, this Court said

that the judicial delivery of possession vested an indefeasible title in the grantee, and the title-paper shows that this delivery of juridical possession was given in this grant. A grant similar in every essential respect to the one under consideration, situated in the same county of Arizona, made at nearly the same time and under the same laws, is the San Rafael de la Zanja grant, passed on by this Court in the case of Cameron *v.* The United States, *supra*. The Court expressly stated in that case that juridical possession of the land had been delivered in pursuance of the measurements. So it was in this grant, and this delivery of possession made the grant complete and perfect.

As to the second of the requirements above indicated, the question is, Is the legislation under the Gadsden treaty the same in legal effect as under the Louisiana treaty, so that the above decisions are applicable to this case?

As above stated, under the treaty of Paris no legislation was enacted regarding perfect titles. The District Courts of the United States were given jurisdiction over inchoate or equitable titles and over such titles only.

A different theory was adopted in carrying out the provisions of the treaty of Guadalupe Hidalgo. The act of March 3, 1851, by its eighth section required all titles, legal and complete as well as inchoate or equitable, to be submitted to the commissioners. Any claim not presented in the time fixed by the act was barred, as held in Botiller *v.* Dominguez, 130 U. S. 238.

But although all titles had to be submitted to that commission, so that the questions between a claimant and the United States could be determined by that tribunal, it was held in a series of cases that the grantee of even an imperfect grant might maintain ejectment upon it while it was *sub judice* under the act. A full history of such litigation is given in Montgomery *v.* Bevans, 1 Saw. 653. In Ferris *v* Coover, 10 Cal. 589, at page 621, the court held that "the action of ejectment will lie directly upon

the grant to recover the land or any portion thereof embraced within its boundaries." This case was followed in Cornwall *v.* Culver, 16 Cal. 424, and in Thornton *v.* Mahoney, 24 Cal., 569, which cases are quoted and approved in Van Reynegan *v.* Bolton, 95 U. S. 33. In carrying out the Gadsden treaty, the act of July 22, 1854, extended to Arizona by the act of July 15, 1870 (16 Stat. at Large, 291), was passed, establishing the office of Surveyor General, and providing for a preliminary report by him on claims under the former government and for final action on such claims by Congress. but before this suit was brought, these acts were repealed by the act of March 3, 1891, creating the Court of Private Land Claims.

The legislation as to private land claims in force at the time this action was brought and decided was and now is the act of March 3, 1891. Our contention is that as to perfect titles this act is similar to the acts of 1824 and 1844, because under the eighth section of the act no jurisdiction as to perfect titles was conferred upon the court created by the act. The act provides that persons claiming lands under a title "that was complete and perfect at the date when the United States acquired sovereignty therein shall have the right (but shall not be bound) to apply to the said court," etc. Thus, if the claimant did not apply, and if he was not brought in by the government, neither of which was done in this case, the act of March 3, 1891, had no more effect on him than if it had not been passed. Under the act of March 3, 1851, he was compelled to present his claim, or be bound by its limitations, but under the act of 1891 he was under no such obligation. He might present his title if he chose, or decline to do so if he saw fit, and he incurred no penalty by so declining. The stipulation herein shows that "at the time of the institution of this suit no proceedings for the confirmation of said grant were pending before

any Surveyor General of the United States, or before Congress, or before the Court of Private land Claims created under the act of Congress of March 3, 1891." As just argued, as this act of 1891 did not compel plaintiff to submit his perfect title, and as he has not chosen to do so, he is in no wise affected by that act. Not having submitted himself to it, he is no more bound by any of its provisions than if the act had provided in terms, as did the acts of 1824 and 1844, that it should not affect perfect titles. This is the unquestionable legal effect of the act. It says, in legal effect, that it shall in no wise affect any perfect title unless such title shall be brought before the Court of Private Land Claims in one of the two ways provided in the acts. As this title was not before that court, the owner of the title stands just as though the act of July 22, 1854, had been repealed and the act of 1891 had never been passed; that is to say, he stands just as the holder of a complete title did under the Louisiana treaty, with the right to litigate his title in the courts of competent jurisdiction. It seems to follow necessarily that the lower court had jurisdiction.

3. That Congress has never attempted to violate the obligations of the Gadsden treaty appears from the foregoing. The lower court says that the above-cited decisions of this Court "seem to be under different treaties, and where Congress had given the courts certain jurisdiction." The inaccuracy of this statement appears from the fact that the provision of the Gadsden treaty is identical with the third article of the treaty of Paris. The treaties are, therefore, not different but the same. Nor is it true that the decisions were where "Congress had given the courts certain jurisdiction," because no jurisdiction had been given the courts of the United States under the acts of 1824 and 1844. In the absence of any legislation whatever as to perfect titles the holdings were announced that a party claiming a full and perfect title was "left to assert it in the ordinary forms of law upon the documents

under which he claimed." This he could do "in any court having competent jurisdiction to try and decide a disputed title to land between individual claimants."

There are, it is submitted, only two reasons why a court of ordinary jurisdiction could not take cognizance of a claim under a Spanish or Mexican grant. In the first place, it could not in any case entertain a suit against the United States where the sovereign had not consented to be sued, and, in the second place, it could not entertain any case jurisdiction of which had been committed to another tribunal.

This action is not embraced within either of the foregoing reasons. It is not a suit against the United States. The government is not a party to the action, nor are its rights involved or affected in the slightest degree. Nor has jurisdiction of this cause been committed to any other tribunal. This is shown by the fact that the act of July 22, 1854, had been repealed before the filing of this complaint and the act of March 3, 1891, did not make it obligatory, as above stated, for plaintiff to come in under its provisions.

The Arizona court says that "this last act does not authorize us to settle the title to Mexican land grants." If by this is meant to settle the title as against the United States, the answer is that no such question is involved in the case. If it is meant that the court has no jurisdiction in this case unless such jurisdiction has been conferred, it is submitted that the cases heretofore cited show that this is a misapprehension. The court does not have to have jurisdiction conferred to try this perfect title; it has jurisdiction, which it retains unless some act of Congress has taken such jurisdiction away.

The lower court states that the case of Astiazaran *et al. v.* Santa Rita Mining Co., 148 U. S. 80, "settles the question that no such action as the present could be maintained if the claim had been reported to Congress by the Surveyor General, if commenced before Congress had

acted thereon." The undersigned had the honor of representing the appellants in that case, and as he understands the decision it holds just the reverse of the above proposition. This Court in that case pointed out that the mode of fulfilling treaty obligations belonged to the political department of the government; it held that the question in the case was within the jurisdiction of the Surveyor General, and concluded the decision by saying that "the petition to the Surveyor General is the commencement of proceedings which necessarily involve the validity of the grant from the Mexican government under which the petitioners claim title; the proceedings are pending until Congress has acted; and while they are pending the question of title of the petitioners cannot be contested in the ordinary courts of justice."

The petitioners were the ones in whose favor the Surveyor General had made the recommendation, and it was held that their title could not be contested by others. To construe this decision as holding that the petitioners themselves could not assert their rights would be to make the decision meaningless. The decision holds that "the question of the title of the petitioners" could not be contested, assuming, of course, that the petitioners had a title which they could litigate like any other owner of land. It will be noted that it is stipulated that the plaintiff in this action is the "vendee and assignee of and has acquired all the right, title and interest of the original grantee" of the grant, and he is, therefore, in as good a position as were the petitioners in the Astiazaran case.

Not only is it true that the act of July 22, 1854, which was the one construed in the Astiazaran case, had been repealed prior to the commencement of this action, and no jurisdiction of the cause had been committed to any other tribunal, but, in addition, it seems clear that the question involved in this case could not be determined by any tribunal but a judicial one. The question in the Asti-

azaran case was considered to be within the province of Congress to determine because "it necessarily involved the validity of the grant from the Mexican government," which question was then pending before Congress. The contention in that case was, in effect, between A and B, rival claimants to the grant, and this Court held that it could not decide that B, who was opposing the claim of the petitioners, was the owner, because Congress might decide that the petitioners were the owners, in which case its decision would control. But in the present case, as more than once stated, there is no question which has or could come before Congress, at least, under any legislation now in force, or in force when the suit was brought.

As opposed to the theory of the lower court that it could not try this case unless jurisdiction were expressly conferred, this Court held in U. S. *v.* McCullagh, as heretofore quoted, that "there was necessity for any special jurisdiction to try perfect titles. Questions growing out of them "are purely judicial ones." U. S. *v.* Arredondo, *supra*. These Louisiana and Florida state courts of local jurisdiction had no special jurisdiction conferred upon them, and possessed no ampler jurisdiction than the district courts of Arizona. This Court having so often held that persons claiming to own perfect titles could protect their property in these Louisiana local courts, it is submitted that such jurisdiction can be denied to the Arizona courts only by abandoning the doctrine of the early cases. The decision of the Arizona court cannot be reconciled with the decisions of this Court.

The lower court puts the question "Suppose we should consider plaintiff's title complete and perfect and order the title quieted, and afterwards action should be begun in the land court against the owner of the grant under section 8 of the act of March 3, 1891, and that court should hold the grant of no avail, of what force

would our decree be?" The question presents no difficulty. If A's title is quieted in a suit against B, and afterwards C's title is quieted in a suit against A, no confusion results. The decree in favor of A is not set aside because of the later decree in favor of C.

Referring again to the California and other cases cited above as to the rights of the grantee by virtue of the grant itself, it is held in Montgomery *v.* Bevans, 1 Saw. 658, at at pages 682 *et seq.*, that grant claimants have a right to the possession of lands claimed under their grants until final segregation or final action by the government on the claim. This and the other cases are put on the ground that all grants, whether perfect or imperfect, "passed to the grantees a present and immediate interest in the premises designated." "The grantees were obliged to take possession, and their right of possession necessarily extended to the whole tract." So, in Ferris *v.* Coover, 10 Cal., 589, *supra*, at page 621, a case in which the court said that the questions had attracted the attention of the ablest jurists in that state, and had been placed before the court in every possible view, the court held that the possession of a grantee under a Mexican grant "was his right. It was a right to the use and enjoyment of property, and as such was guaranteed by the stipulation of the treaty. It accompanied the grant, and, like any other right of property, may be enforced in our courts. The grant conveying, as we have seen, the title, carries with it the right to the possession, use and enjoyment of the land until by the appropriate action of the general government the estate of the grantee is defeated--admitting that it is competent for the government to provide for defeating it. It follows that the action of ejectment will lie directly upon the grant to recover the land, or any portion thereof, embraced within its boundaries."

This case was cited, approved and followed in Cornwall *v.* Culver, 16 Cal. 424, where the court said that "it

is a matter of surprise that there was ever any serious question as to the right of Sutter (a Mexican grant claimant), or those claiming under him, to recover possession by virtue of the grant itself." So, in Thornton *v.* Mahoney, 24 Cal. 569, the same doctrine of the right of the grantee to possession under his grant is declared to be "in consonance with the principles of reason and justice," and to meet with the approval of the court.

These cases are quoted and approved in the decision of this Court in Van Reynegan *v.* Bolton, 95 U. S. 33, where Mr. Justice Field in delivering the opinion of the Court reaffirms the doctrine that until final action or segregation by the government, no survey "could impair the right of the grantees to the possession of the entire tract as delivered by the former government to the grantee under whom they claim. Until then no person could interfere with their right of possession of the whole." The possession of defendants, who had intruded upon the lands claimed was, therefore, "that of simple intruders and trespassers without color of right."

These cases seem to be directly in point, and if the principles which they announce are to control, it seems that the conclusion of the lower court cannot stand. In U. S. *v.* Chaves, *supra*, this Court in construing the treaty of Guadalupe Hidalgo, adopted the language of Chief Justice Marshall in U. S. *v.* Percheman, 7 Pet. 51, 86: "The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

This general principle is specifically embodied in article 8 of the treaty of Guadalupe Hidalgo and article 5 of the Gadsden treaty, by which articles the property of Mexicans within the territory ceded by Mexico to the

United States was to be "inviolably respected," and they and their heirs and grantees were "to enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States." Astiazaran *v.* Santa Rita Land & Mining Co., 143 U. S., *supra*, 80, 81.

This treaty provision plaintiff invokes in this case. The grantee of this Sonoita grant was, "as proprietor, owner in fee and only possessor of the said lands," given the use and property thereof by the former government. One of his rights incident to his ownership was to go into the courts to assert or defend his property by proper judicial proceedings. "Individual rights of property in the territory acquired by the United States from Mexico were not affected by the change of sovereignty and jurisdiction," as this Court held Botiller *v.* Dominquez, *supra*, (130 U. S. 249). Therefore, we submit, the individual right of the owner of this grant to bring this suit was not affected by the change of sovereignty, and the court had jurisdiction to hear this action. If this right be denied, it can only be by treating as a nullity, for the purpose of this action, a complete and perfect title derived from the former government, when a similar title from our own government would be respected. The holder under a patent from the United States could maintain a suit to quiet his title, but this holder under a patent from Mexico is by the Arizona court denied the right.

In the very recent case of Shiver *v.* U. S., decided November 11, 1895, this Court points out that under the homestead laws "the right which is given to a person or corporation by a reservation of public lands in his favor, is intended to protect him against the action of third parties, as to whom his right to the same may be absolute. But, as to the government, his right is only conditional and inchoate. As between the United States and the settler the land is for certain purposes to be deemed the property

of the former, whereas between the settler and the State it may be deemed the property of the settler."

This principle applies, to some extent, to the present case. The plaintiff's rights, claiming under a complete and perfect title, are absolute as against the defendant herein, although plaintiff may be called on at any time to prove his claim against the United States in any tribunal in which Congress may establish for that purpose. A claim under a grant exactly similar to the one in this case was held by this Court in Cameron *v.* U. S., 148 U. S. 301, *supra*, to constitute claim or color of title. In Newhall *v.* Sanger, 92 U. S. 761, this Court announced that the duty of adequately ascertaining and protecting all claims to land under the former government, a duty enjoined by a sense of natural justice and treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until a determination of the claim. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication, and the claimed lands were regarded as forming "a part of our national domain only after the claim covering them had finally been decided to be invalid."

The lower court holds that "Congress must in some way confirm this class of Mexican grants before we have jurisdiction thereof." Under such a view, the rights to judicial protection which existed prior to the treaty disappear. A generation has passed away since the Gadsden treaty, and many years more must elapse before the questions between the grantees of these grants and the United States can be finally determined. During this interval is the grantee of a grant to be deprived of judicial redress against trespassers on what he claims to be his property? If so, the effect will be nothing less than the destruction of his rights. The court did not think in Ferris *v.* Coover that he was to be left thus helpless, and we believe this Court will not think so, but will hold that until this grant is

defeated, if it ever should be, by the appropriate action of the general government, the grantee is entitled to the possession, use and enjoyment of the land, and to invoke the protection of the courts in the present action.

It is respectfully submitted that the court had jurisdiction of this action, and that the judgment of the Supreme Court of Arizona should be reversed.

Rochester Ford.

ROCHESTER FORD,

Attorney for Appellant.

In the Supreme Court of the United States.

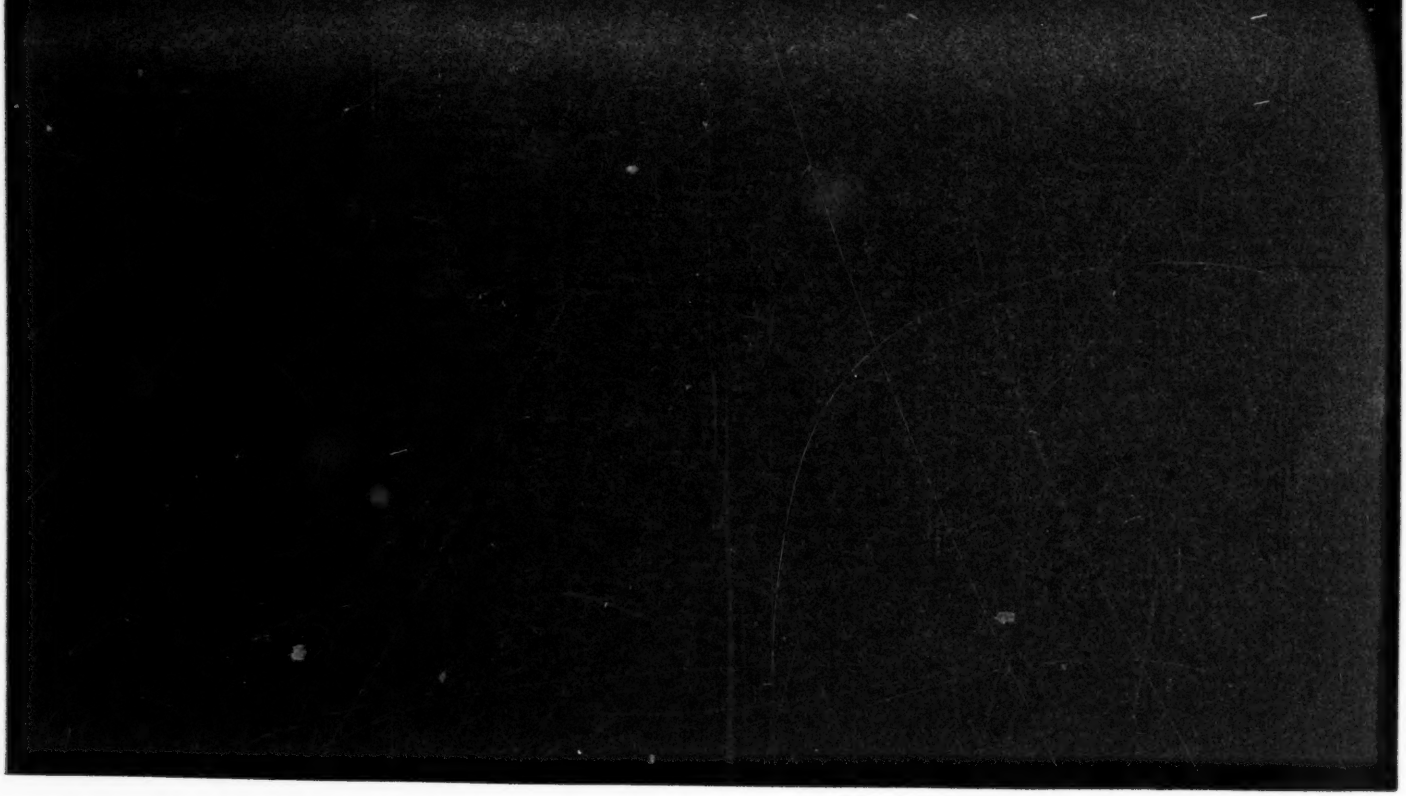
OCTOBER TERM, 1897.

SANTIAGO ARIZA, ADMINISTRATOR, with will annexed, of FRANK ELY, deceased, appellant;

THE NEW MEXICO AND ARIZONA Railroad Company.

No. 15.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

SANTIAGO ARMIJO, ADMINISTRATOR, with will annexed, of Frank Ely, deceased, appellant, v. THE NEW MEXICO AND ARIZONA Railroad Company.	No. 15.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF ON BEHALF OF THE UNITED STATES.

The intervention on behalf of the Government in this case was made necessary by reason of the pendency in this court, on appeal from the Court of Private Land Claims, of the case of *Armijo, etc., et al.* v. *United States*, No. 27, a suit instituted on behalf of the Government, under the provisions of the third paragraph of section 8 of the act of 1891 creating the Court of Private Land Claims, to test the validity of a private land claim known as the San José de Sonoita grant, situate in the

Territory of Arizona and within the demarcations of the territory acquired from Mexico under the Gadsden purchase.

The suit on behalf of the United States was directed by the Attorney-General by reason of the pendency in the district court of Arizona of this suit of *Ainsa, etc.*, v. *The New Mexico and Arizona Railroad Company*, and now in this court on appeal as No. 15, and that of the same plaintiff against the same defendant and others, No. 16, by which it was sought to quiet the title of the plaintiff under the statutes of Arizona against the defendants who were in possession of certain portions of the Sonoita grant. Upon the institution of the proceedings in the Court of Private Land Claims, it was supposed and understood by counsel for the Government that no further steps would be taken in the Territorial court until the final determination of the validity of the Sonoita grant by the Court of Private Land Claims and this court in case of appeal.

The attention of counsel was called to the fact that this case was pending on appeal from the Territorial supreme court and had been submitted under the twentieth rule, and motion was made to remand the same to the docket and permit the United States to intervene.

From the record it appears that the plaintiff filed his suit in the district court of the first judicial district of the Territory of Arizona on June 1, 1892, alleging that he was the owner in fee of all that certain tract of land granted by the Mexican authorities to Leon Herreras on May 15, 1825, and that the same was known as and called

the Rancho de San José de Sonoita, specifying its location, and which was more particularly described by extracts from the *testimonio* of the alleged grant; that the defendant claimed an estate or interest in the same adverse to the plaintiff, and that said claim was without any right whatsoever, as the defendant had no estate, right, title, or interest in said lands or any part thereof; praying judgment—

> (1) That said defendant be required to set forth the nature of its claims, and that all adverse claims of the defendant may be determined by a decree of this court.
>
> (2) That by said decree it be declared and adjudged that the defendant has no estate or interest whatever in or to said lands and premises, or in or to any part thereof, and that the title of plaintiff is good and valid.
>
> (3) That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land or premises, or to any part thereof, adverse to the plaintiff, and for such and further relief as to this honorable court shall seem meet and agreeable to equity and for his costs of suit. (R., 1–3.)

About nine months after the institution of the suit by the United States, before referred to, an answer was filed by the defendant railroad company. Prior to this, however, on May 29, 1893, an agreed statement of facts was entered into by the attorneys for the respective parties, and on June 5, 1893, the same was filed, by which it was provided that a jury be waived and judgment might be rendered upon the same as and for the evidence in the case. (R., 6–13.)

This statement of facts consisted simply in an admission on behalf of the railroad company that the grant of one and three-fourths *sitios* made to Herreras of the place called San José de Sonoita was made, executed, and delivered to him at the time and place and by the persons and officials when, where, and by whom it purports to have been signed, made, executed, and delivered, and that the plaintiff was the vendee and assignee of and acquired all the right, title, and interest of the original grantee thereof, and a translation of the *titulo* of the Sonoita grant was fully set forth therein; that the claimant had filed, on December 29, 1879, before the surveyor-general of Arizona, under the laws of July 22, 1854, and July 15, 1870, a petition for the confirmation of the same by Congress, and that the same was never acted on by Congress, and at the time of the institution of the suit no proceedings for the confirmation of the same were pending before the Surveyor-General of the United States, or before Congress, or before the Court of Private Land Claims, created under the provisions of the act of Congress of March 3, 1891. It was further stipulated that, prior to the commencement of the action, certain persons named had entered upon the land within the limitations of the grant as preemption or homestead settlers, claiming the same to be public lands of the United States, and that thereafter, and before the commencement of the suit, the defendant, by condemnation proceedings against and sundry mesne conveyances from the said named persons, acquired and claimed a right of way through said several tracts of land so settled upon, which right of way

was within the limits of the grant; that the agreed statement of facts was for the purpose of this suit only, and nothing therein agreed upon should be taken as admitted for or against either of the parties thereto in any other proceeding whatever. (R., 6–13.)

Upon this state of the record the district judge held that plaintiff's title was not a Spanish or Mexican grant which had been confirmed by Congress, and that the court had no jurisdiction. (R., 14–15.)

An appeal was taken to the supreme court of the Territory and the judgment was affirmed. (R., 19.)

From this decision an appeal was taken to this court, and, as before stated, the case was submitted under the twentieth rule.

It is contended by the appellant that, at the date of the cession to the United States, Herreras and those claiming under him had a complete and perfect title to the grant in question and could assert the same in any form of action against parties other than the United States in any court having jurisdiction of controversies between private parties; that although the act creating the Court of Private Land Claims conferred exclusive jurisdiction upon it to settle and adjudicate such claims as between the United States and claimants of private land claims protected under the treaties of Guadalupe Hidalgo and Mesilla (Gadsden purchase), yet, as this title is alleged to be a complete and perfect grant acquired from Mexico, plaintiffs were given the permission to invoke the jurisdiction of that court, but were not compelled to do so (section 8, act of March 3, 1891, creating Court of Private Land

Claims). Hence it became the duty of the district court to proceed under the statutes of Arizona to try the title at the suit of the claimant to the grant, which it did upon the agreed statement of facts, and upon the whole record dismissed the petition for want of jurisdiction. The form of action, if the court entertained jurisdiction thereof, necessarily required it to determine, as a matter of law, whether the grant alleged to have been made to Herreras by the Republic of Mexico was a complete and perfect title at the date of the cession of the Territory to the United States.

The acts of Congress of 1805, 1807, 1824, and 1844 were passed for the purpose of settling and adjudicating private land claims in the Louisiana purchase where the titles claimed were equitable. The act of 1851 (California act) conferred upon a board of commissioners and upon the district court on appeals jurisdiction of both perfect and imperfect grants, and it was held in the case of *Botiller* v. *Dominguez* (130 U. S., 238), that one claiming under a perfect grant, which had not been confirmed under that act, could not assert the same against private individuals in the local courts. The language of the California act differs materially from that contained in the Missouri acts.

It is contended on behalf of the appellant that the act creating the Court of Private Land Claims (section 8) differs from the California act in that the jurisdiction over perfect claims is permissive but not compulsory, and, as no penalty for failure to present the same was prescribed, the right to proceed in the local courts upon a perfect title was in no way impaired.

Considering the entire act creating the Court of Private Land Claims, and especially all the provisions of section 8, appellant's view seems to be extreme on the state of the case. That section provides, the claimant, if he has a complete and perfect title to his grant, may institute his suit in the Court of Private Land Claims seeking confirmation of the same, but shall not be bound to do so; it also provides that the United States may proceed against him in that court to test the validity of his grant or determine the extent of its boundaries, and such a proceeding had been instituted with respect to the grant in this case long prior to the filing of the answer by the defendant. Construing both clauses, it would seem that an adjudication of all claims to land was contemplated, either by the claimants or by the United States, whether they were perfect or imperfect, and that claimants were given until March 3, 1893, to determine whether they would elect to stand on their titles as perfect, and not seek the jurisdiction of that court, and assume the peril of having their claims barred if, upon a proceeding thereafter by the United States, the courts should hold the same to be only equitable. This position is justified by the provisions of the treaty itself which, it is contended, was purely and simply executory in its terms.

"Although a foreign treaty is, by the Constitution of the United States, in like manner with acts of Congress and the Constitution the supreme law of the land, yet generally it does not execute itself, but requires some legislation, especially under a republican form of government, to carry it into effect. Chief Justice Marshall

clearly explains the rule as to the relation between treaty and statutory law, when he says that a treaty 'is to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.'" (II Wharton's International Law Digest, p. 71.)

The treaty of 1853 contains a provision not contained in that of Guadalupe Hidalgo of 1848, which, it is contended, makes it necessary for claimants to obtain recognition of their rights, although they may deem their titles complete and perfect.

> ART. VI. No grants of land within the territory ceded by the first article of this treaty bearing date subsequent to the day—twenty-fifth of September—when the minister and subscriber to this treaty on the part of the United States proposed to the Government of New Mexico to terminate the question of boundary, will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico.

It will thus appear that, no matter what estate was vested in the grantee, no grant of land was to be *respected* or considered *obligatory* upon the United States unless two conditions appear to have been complied with:

(1) The definite location of the grant on the earth's surface.

(2) That the grant had been duly recorded in the archives of Mexico.

It is reasonable to assume such a qualification of the usual provisions contained in treaties of cession was intended to restrict claimants in the assertion of their titles, although the estate might be a perfect one. Before the local court could quiet the title of plaintiff it must have found that the same was complete and perfect at the date of the cession and should be respected and considered obligatory by the United States, which obligation can alone be determined under the authority of the political branch of the Government. Although the United States was not a party to the suit, still for plaintiff to recover the court must necessarily determine those two questions which were intended to be determined under the authority of Congress.

Assuming that the plaintiff could proceed upon his allegation of the ultimate fact of the vesture of a complete and perfect title and that upon such allegation it became the duty of the court to hear and try that question for him, it does not follow that his allegation has been sustained by the evidence (agreed statement of facts). The court below did entertain jurisdiction, considered his evidence, and dismissed his complaint, because, upon the whole record, want of jurisdiction appeared by reason of the fact his title was under a certain Spanish or Mexican grant which had not been confirmed by Congress. The conclusion of the court may well be justified under the terms of the treaty of 1853 and under the provisions of the act of 1891 conferring jurisdiction upon

the Court of Private Land Claims, for, in respect of all claims, whether perfect or imperfect, Congress declared by that act exactly how far and upon what conditions the United States would be bound.

It is not to be supposed that citizens of the United States, when called upon to contest in the local courts claims made under Spanish and Mexican land grants, would be placed in any different attitude than the Government permitted itself to assume in carrying out treaty obligations.

Section 13 of that act provides:

> That all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act.

This applies to all grants, perfect and imperfect.

The eighth subdivision of this section provides:

> No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and manner stated in any such concession, grant, or other authority to acquire land.

If any grant was made on a condition or requirement subsequent, the compliance with which was not made to appear to the satisfaction of the court, it could not be admitted or confirmed; yet it has been held that a complete and perfect title often passed with conditions subsequent imposed, and, in the absence of some proceeding to divest said perfect title for failure to comply therewith, the

estate remained vested and could not be collaterally attacked. Unless, therefore, all claims to land were intended to be embraced within the scope of this act, claimants of perfect titles, with unperformed conditions subsequent, could obtain full recognition of all their rights as against citizens in the local courts, and yet would fail when the United States is called upon to recognize the same.

It is not believed that the local court in this proceeding could investigate this question unless it assumed jurisdiction alone conferred upon the Court of Private Land Claims.

The courts of the country can go no farther in carrying out treaty obligations than the political branch of the Government has authorized, nor is it possible to assume that they will take a different view of these obligations from that taken by that branch of the Government; hence the act creating the Court of Private Land Claims is the declared intent of that branch of the Government, and the district court must, in considering whether a grant was complete and perfect under the laws of Spain or Mexico, look to said act to determine whether this Government has authorized its recognition and upon what terms and conditions. The instant it does so, its jurisdiction ceases.

The observations by Mr. Justice Gray in the case of *Astiazaran* v. *Santa Rita, etc., Co.*, 148 U. S., 80–83, seem very pertinent to this question:

> The action of Congress, when taken, being conclusive upon the merits of a claim, it necessarily

> follows that the judiciary can not act upon the matter while it is pending before Congress; for if Congress should decide the same way as the court, the judgment of the court would be nugatory; and if Congress should decide the other way, its decision would control.

Also the observation of Judge Hawkins in the opinion of the court below (R., 21):

> Appellant wants us to consider his grant as being under the provisions of section 8, or, rather, of the first paragraph of section 8 of the last-mentioned act (March 3, 1891)—that is, one that was complete and perfect when the United States acquired sovereignty—and not under section 6 of said act. Suppose we should do so and order the title quieted, and some of the settlers thereon should get the Attorney-General to commence an action in the land court against the owner of the grant under said section 8, and that court should hold said grant of no avail, then of what force would our decree be?
>
> Congress in providing a remedy for settling these disputed titles has nowhere delegated any authority to these courts to settle same. It has reserved to itself the power of settling such titles and has delegated its power to the land court.

Judge Hawkins, at the time the opinion was written, was aware, no doubt, of the pendency and pending trial of the suit on behalf of the United States against Ainsa, administrator, etc., to test the very question he was seeking to get that court to determine in his favor in an effort to quiet title against the railroad company.

It is believed that the declared intent of Congress expressed in the act of March 3, 1891, necessarily

deprived the local courts of the right to exercise any jurisdiction, because they were incompetent to determine in any proceeding between private parties the very facts it required should be made to appear by claimants as a condition precedent to the right to have their claims admitted or confirmed, whether perfect or imperfect.

It is therefore submitted that the local courts of the Territory of Arizona had no jurisdiction in the matter.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

No. 350 & 351.

Motion Papers for U. S.

Filed Mar. 2, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

SANTIAGO AIRNA, ADMINISTRATOR, WITH will annexed, of Frank Ely, deceased, appellant,
v.
THE NEW MEXICO AND ARIZONA RAILroad Company.
} No. 350.

APPEAL FROM THE ARIZONA TERRITORY SUPREME COURT.

MOTION BY THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

SANTIAGO AINSA, ADMINISTRATOR, WITH will annexed, of FRANK ELY, deceased, appellant,
v.
THE NEW MEXICO AND ARIZONA RAILroad Company.
No. 350.

APPEAL FROM THE ARIZONA TERRITORY SUPREME COURT.

MOTION BY THE UNITED STATES.

This cause has been submitted upon brief, and is now under consideration by the court.

The suit involves the validity of a grant of lands in Pima County, Ariz., known as the Sonoita grant.

The brief of Mr. Rochester Ford filed in the cause shows that the foundation of the suit is the claim that the grant is a complete and perfect title and vested the fee in the grantee, and that for this reason it was not necessary, under the act of March 3, 1891, establishing the Court of Private Land Claims, for the appellant to

have his title confirmed by the United States, and that he has a right to go into the courts of Arizona and set up his title against trespassers, or those seeking to put a cloud upon it.

An examination of the record and the brief filed shows that the purpose of the suit is to have this court decide this question of jurisdiction, and declare the grant valid.

Particular attention is called to the following features in the record:

1. The suit is brought in the name of Ainsa, administrator, with the will annexed, but the will is not in the record, and there is nothing to show that the testator devised these lands in such a way as to give his personal representative a right to bring any suit respecting their title. It is true that there is an allegation on page 2 of the record that the plaintiff is the owner in fee of the lands in question, but this, it seems, in view of the fact that the suit is by an administrator, does not sufficiently set forth the title.

2. The complaint was filed June 1, 1892. (Rec., p. 3.) On June 4, 1892, the defendant entered its appearance, waiving service of process, and reserving time "to prepare its defense or *effect a compromise of this suit.*" (Rec., p. 4.)

3. On June 3, 1893, the answer was filed. It alleges that defendant "is the owner and in possession and entitled to the possession of that portion of the lands and premises described in the complaint which constitutes its roadbed, right of way, track, stations, station houses,

and all appurtenances which are held, used, or claimed as its railroad property on and across the said lands in the complaint mentioned." (Rec., p. 5.)

The record shows that the lands held by the defendant were worth "more than the sum of five thousand dollars." (Rec., p. 23.)

4. On the same day the answer was filed the case was decided. (Rec., p. 13.)

On the same day the motion for a new trial was made and overruled. (Rec., p. 14.) On the same day the bill of exceptions was signed. (Rec., p. 15.)

5. The case was heard in the supreme court of the Territory of Arizona upon a stipulation whereby the railroad company, by its counsel, entered its appearance, "not desiring to file a brief or make an oral argument." (Rec., p. 18.)

6. The cause was submitted by agreement in this court, before it was reached on the call, without any brief or argument on behalf of the railroad, notwithstanding the fact that the interest of the railroad exceeded in value $5,000.

7. Attention is called to the fact that in the fourth paragraph of the stipulation it is provided "that this statement of facts is for the purpose of this suit only, and nothing herein agreed upon shall be taken as admitted for or against either of the parties hereto in any other proceeding whatever." (Rec., p. 13.)

There is pending in this court a cause styled *Santiago Ainsa, administrator of Frank Ely, deceased*, v. *The United States*, which is No. 468, October term, 1895, the record number being 15708.

This record has not been printed by the appellant.

The appellant in both these causes is the same, and the grant called in question is identically the same.

Cause No. 468 is a suit which was instituted by the United States in the Court of Private Land Claims, on October 19, 1892, against the claimants of this grant. On November 20, 1892, Ainsa, administrator, etc., filed his answer to the petition of the Government, being represented by Mr. Rochester Ford, who represents him in cause No. 350. It will be observed that this answer was filed in the cause brought in the Court of Private Land Claims before the stipulation in case No. 350, which appears upon pages 12 and 13 of the record, was made.

This stipulation, paragraph 2, which is set out on page 2 of Mr. Ford's brief, says that "at the *time of the institution of this suit* no proceedings for the confirmation of said grant were pending before any surveyor-general of the United States, or before Congress, or before the Court of Private Land Claims created under the provisions of the act of Congress of March 3, 1891."

While the recital that at the time of the institution of this suit no proceedings were pending before the Court of Private Land Claims was strictly true, yet it does not show the fact that the Government had brought a suit at the time the stipulation was made, in respect of this identical grant, and against the same party, and that this suit was then pending.

As the case now stands, on submission to the Supreme Court, with no knowledge on its part of cause No. 468,

there is nothing to show the court that the alleged perfect title to this grant is questioned.

Issues were made up in cause No. 468 in the Court of Private Land Claims, and on March 20, 1894, Ainsa filed an amended answer, which answer was in effect an original bill under the provisions of the act of Congress creating the Court of Private Land Claims, in which a confirmation of this grant was asked.

The trial was commenced on March 20, 1894, and judgment was rendered in favor of the United States, rejecting the claim and declaring the grant to be void, on March 30, 1894, from which judgment Ainsa appealed to the Supreme Court of the United States.

Questions are raised in which the Government is materially and vitally interested, to wit, the construction to be given to the provisions of the treaty of December 30, 1853, as compared with the Paris treaty of 1803.

If Mr. Ford's contention as to the proper construction to be put upon the Mesilla treaty is passed upon, the litigation now pending in the Court of Private Land Claims and before the Supreme Court of the United States on appeal, in relation to the title to lands lying within that purchase, will be materially affected without the Government being heard.

Wherefore the Solicitor-General respectfully moves that the United States be permitted to intervene in this cause and that this cause be remanded to the docket to be heard with cause No. 468, or that such other action may be taken as the court may deem proper.

HOLMES CONRAD,
Solicitor-General.

AINSA *v.* NEW MEXICO AND ARIZONA RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 1. Submitted March 8, 16, 1897. — Decided October 18, 1899.

Since the act of Congress of March 3, 1891, c. 539, establishing the Court of Private Land Claims, the courts of the Territory of Arizona have jurisdiction, as between private parties, to determine whether a title under a Mexican grant, which has not been confirmed or rejected by, and is not pending before Congress, and which is asserted to have been complete and perfect by the law prevailing in New Mexico before the cession of the country to the United States, was complete and perfect before the cession.

THE case is stated in the opinion.

Mr. Rochester Ford for Ainsa.

Mr. Solicitor General and *Mr. Matthew G. Reynolds* for the United States.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a complaint, filed June 1, 1892, in a district court of the Territory of Arizona and county of Pima, by Santiago Ainsa, administrator with the will annexed of Frank Ely, against the New Mexico and Arizona Railroad Company, to quiet the plaintiff's title in a tract of land in that county, known as the rancho San José de Sonoita, under a grant made by the Mexican Government to Leon Herreros on

May 15, 1825, which was alleged to have vested a complete and perfect title in fee in the grantee.

The defendant denied the plaintiff's title; and asserted a right of way over the land under condemnation proceedings against persons who had entered thereon as preëmption or homestead settlers, claiming that it was public land of the United States.

The parties waived a trial by jury, and submitted the case to the judgment of the court upon an agreed statement of facts, which set forth what was admitted to be a correct translation of the "title deeds of a grant of one sitio, and three fourths of another sitio, surveyed on behalf of Don Leon Herreros, resident of Tubac, situated in a place called San José de Sonoita" — consisting of the petition of Herreros to the intendente of the province of Sonora and Sinaloa; an order of the intendente for an official survey and valuation of the land; its survey and location by metes and bounds; the delivery of juridical possession to Herreros; a valuation of the land; a reference of the expediente to the promoter fiscal for examination, and his report recommending a sale by auction; a sale by auction to Herreros, after due publication of notice; the intendente's approval of the proceedings; payment by Herreros of the amount of the valuation, with fees and costs; a grant to him by the commissary general in the usual form; and a record of the grant in the Mexican archives. It was agreed that these papers were executed and delivered according to their purport, and that the plaintiff was the vendee and assignee of all the right, title and interest of Herreros.

It was also agreed that a petition for the confirmation by Congress, under the acts of July 22, 1854, c. 103, § 8, (10 Stat. 309,) and July 15, 1870, c. 292, § 1, (16 Stat. 304,) of the Mexican grant, was filed on December 29, 1879, in the office of the United States surveyor general for the Territory of Arizona, but was never acted on by Congress; and that, at the time of the commencement of this suit, no proceedings for the confirmation of the grant were pending before Congress, or before any surveyor general of the United States, or before the Court

of Private Land Claims created by the act of March 3, 1891, c. 539. 26 Stat. 854.

It was also agreed that, before the commencement of this suit, certain persons named had entered upon the several tracts of the granted land, as preëmption or homestead settlers, claiming them to be public lands of the United States; and that thereafter, and before the commencement of this suit, the defendant, by condemnation proceedings against, and mesne conveyances from, those persons, acquired and now claimed a right of way through those tracts and within the limits of the grant.

The parties further stipulated that "this statement of facts is for the purpose of this suit only, and nothing herein agreed upon shall be taken as admitted for or against either of the parties hereto in any other proceeding whatever."

The district court held that it had no jurisdiction, because the plaintiff claimed title under a Mexican grant which had not been confirmed by Congress, and therefore dismissed the suit; and its judgment was affirmed by the Supreme Court of the Territory. 36 Pacific Reporter, 213. The plaintiff appealed to this court.

The case was originally submitted to this court upon a brief for the appellant only, without any opposing brief. But it was afterwards submitted anew upon the appellant's brief, as well as a brief which the court allowed to be filed in behalf of the United States, because of their interest in the question involved, and of their being a party to a suit, involving the validity of the same Mexican grant, brought by the United States against this appellant in the Court of Private Land Claims, and since decided by this court and reported. *Ely's Administrator* v. *United States*, (1898) 171 U. S. 220.

The question of jurisdiction presented by the record depends upon the effect of the treaty between the United States and Mexico of December 30, 1853, (known as the Gadsden treaty,) and of the acts of Congress above cited; and may be conveniently approached by first referring to the decisions of this court under various treaties by which the United States have acquired territory from France, Spain and Mexico.

Private rights of property in land lying within a territory ceded by one independent nation to another by a treaty between them are not affected by the change of sovereignty and jurisdiction; and are entitled to protection, whether they are complete and absolute titles, or merely equitable interests needing some further act of the government to perfect the legal title. The duty of securing such rights, and of fulfilling the obligations imposed upon the United States by the treaty, belongs to the political department; and Congress may either itself discharge that duty, or delegate its performance to a strictly judicial tribunal or to a board of commissioners. *United States* v. *Percheman*, (1833) 7 Pet. 51, 86, 87; *Delassus* v. *United States*, (1835) 9 Pet. 117, 133; *Strother* v. *Lucas*, (1838) 12 Pet. 410, 438; *Astiazaran* v. *Santa Rita Mining Co.*, (1893) 148 U. S. 80–82, and cases there cited; *Stoneroad* v. *Stoneroad*, (1895) 158 U. S. 240, 248; *Rio Arriba Co.* v. *United States*, (1897) 167 U. S. 298, 309. As was said by this court, speaking by Mr. Justice Trimble, in a leading case: "It may be admitted that the United States were bound, in good faith, by the terms of the treaty of cession by which they acquired the Floridas, to confirm such concessions as had been made by warrants of survey; yet it would not follow that the legal title would be perfected until confirmation. The Government of the United States has throughout acted upon a different principle in relation to these inchoate rights, in all its acquisitions of territory, whether from Spain or France. Whilst the Government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained that the legal title remained in the United States until, by some act of confirmation, it was passed or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon their fairness and validity." *De la Croix* v. *Chamberlain*, (1827) 12 Wheat. 599, 601. Even grants which were complete at the time of the cession may be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before

they can be held to be valid. But where no such proceedings are expressly required by Congress, the recognition of grants of this class in the treaty itself is sufficient to give them full effect.

The treaty of April 30, 1803, between the United States and the French Republic, by which the Province of Louisiana was ceded to the United States, provided, in article 3, as follows: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the religion they profess." 8 Stat. 202. By the act of March 2, 1805, c. 26, § 1, it was provided that persons who before October 1, 1800, being of full age and actually inhabiting and cultivating lands within the territories ceded by that treaty, had obtained a "duly registered warrant or order of survey" from the Spanish or French Government while in possession of those territories, should "be confirmed in their claims in the same manner as if their titles had been completed." Section 4 provided that before March 1, 1806, persons claiming lands by virtue of a completed grant might file it, and persons claiming under an incomplete title should file all papers relating to it, with the register of the local land office. And by section 8, commissioners were to be appointed by the President with power to hear evidence and to decide in a summary way upon the validity of the claims, and to report to Congress all claims confirmed or rejected, and with the latter the evidence adduced in their support. 2 Stat. 324–327. The act of March 26, 1824, c. 173, enacted that it should "be lawful for any person" claiming lands in the State of Missouri "by virtue of any French or Spanish grant, concession, warrant or order of survey, legally made, granted or issued by the proper authorities" before March 10, 1804, "and which was protected or secured by the treaty" aforesaid "and which might have been perfected into a complete title, under and in conformity to the laws, usages and cus-

toms, under the government under which the same originated, had not the sovereignty of the country been transferred to the United States," to present a petition, within two years from the passage of the act, to the District Court of the United States for the District of Missouri, for the confirmation of such claim; that court was given authority to hear evidence and pass upon the claim; and from its decision an appeal might be taken within a year to this court. 4 Stat. 52. The provisions of that act were extended to the States of Louisiana and Arkansas, and to parts of Mississippi and Alabama, by the act of June 17, 1844, c. 95, § 1. 5 Stat. 676. Under those statutes, it was uniformly held by this court that the jurisdiction of the District Court of the United States was limited to suits by persons, who had only an inchoate and equitable title, to obtain an absolute and legal one; and did not extend to a title which was complete and perfect when the treaty took effect; and the reason of those decisions, as declared by Chief Justice Taney speaking for the whole court, was that such a title "is protected by the treaty, and is independent of any legislation by Congress, and requires no proceeding in a court of the United States to give it validity." *United States* v. *Pillerin*, (1851) 13 How. 9; *United States* v. *McCullagh*, (1851) 13 How. 216. So in *United States* v. *d'Auterieve*, (1853) 15 How. 14, Mr. Justice Nelson, delivering the opinion of the majority of the court, said that the title of the petitioners, "if still a subsisting one in them, is a complete and perfect one, and consequently not within the first section of that act [of 1844] which confers the jurisdiction upon this court. The place to litigate it is in the local jurisdiction of the State, by the common-law action of ejectment, or such other action as may be provided for the trial of the legal titles to real estate." 15 How. 23, 24. And Mr. Justice Curtis and three other dissenting justices concurred in the judgment on that ground only. 15 How. 29. See also *United States* v. *Roselius*, (1853) 15 How. 36, 38; *Maguire* v. *Tyler*, (1869) 8 Wall. 650, 652; *Dent* v. *Emmeger*, (1871) 14 Wall. 308, 312; *Trenier* v. *Stewart*, (1879) 101 U. S. 797, 802. And the courts of the State of Louisiana habitually exercised jurisdiction to

try and determine such titles. *Lavergne* v. *Elkins*, (1841) 17 Louisiana, 220, 230; *Murdock* v. *Gurley*, (1843) 5 Rob. (La.) 457, 466; *Jewell* v. *Porche*, (1847) 2 La. Ann. 148; *Riddle* v. *Ratliff*, (1853) 8 La. Ann. 106.

The treaty of February 22, 1819, by which the King of Spain ceded East and West Florida to the United States, provided, in article 8, as follows: "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty." 8 Stat. 258. In *United States* v. *Percheman*, (1833) 7 Pet. 51, this court, speaking by Chief Justice Marshall, said: "A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him. Lands he had previously granted were not his tc cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world." "This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction, which would impair that security further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article." 7 Pet. 86, 87. And it was accordingly held that a Spanish grant which was complete before the date mentioned in the treaty was confirmed by the treaty itself, needed no confirmation by Congress, and was not impaired by its rejection by the commissioners appointed by the President under authority of Congress to examine claims to lands in Florida. See also *United States* v. *Arredondo*, (1832)

6 Pet. 691; *United States* v. *Wiggins*, (1840) 14 Pet. 334, 349.

The treaty of Guadalupe Hidalgo of February 2, 1848, by which the United States acquired California, as well as much of the present Territories of New Mexico and Arizona, from Mexico, provides, in article 8, that the property of Mexicans within the territory ceded "shall be inviolably respected," and they and their heirs and grantees "shall enjoy, with respect to it, guaranties equally ample as if the same belonged to citizens of the United States;" and, in article 9, that "Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." 9 Stat. 929, 930.

By the act of March 3, 1851, c. 41, entitled "An act to ascertain and settle private land claims in the State of California," it was provided, in section 8, that "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government," should present the same to commissioners, to be appointed by the President under the first section of the act; and, by subsequent sections, that the commissioners should decide upon the validity of each claim, and certify their decision, within thirty days, to the District Court of the United States; that the District Court, on the petition of either the claimant or the United States, might review the decision of the commissioners; that an appeal might be taken from the decision of the District Court to this court; that any final decision should be conclusive between the claimant and the United States only, and should not affect third parties, unless they should intervene in the District Court, for which provision was made;

and that "all lands, the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States." 9 Stat. 631–633. This court held that this provision included perfect as well as inchoate titles, and that consequently no suit could be maintained in a court of the State of California on any Spanish title whatsoever, if it had not been presented to the commissioners in accordance with the act of Congress. *Botiller* v. *Dominguez*, (1889) 130 U. S. 238, 252–254, and cases there cited. As was observed by Chief Justice Taney, in *Fremont* v. *United States*, (1854) 17 How. 542, 553, 554, and repeated by Mr. Justice Miller, in *Botiller* v. *Dominguez*, above cited, "The eighth section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination, and to be passed upon by the court." "In this respect it differs from the act of 1824, under which the claims in Louisiana and Florida were decided. The jurisdiction of the court, in these cases, was confined to inchoate equitable titles, which required some other act of the Government to vest in the party the legal title or full ownership. If he claimed to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law, upon the documents under which he claimed."

The treaty of December 30, 1853, (known as the Gadsden treaty,) by which the Mexican Republic ceded to the United States additional territory now within the Territories of New Mexico and Arizona, including the land in controversy in this case, provides, in article 5, that all the provisions of the eighth and ninth articles of the treaty of Guadalupe Hidalgo shall apply to the territory thus ceded, "and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth;" and, in article 6, that "no grants of land within the territory ceded," bearing date since September 25, 1853, "will be considered valid or be recognized by the United States, or will any grants made

previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico." 10 Stat. 1035. This last clause has been held by this court to require an authentic survey and final determination of the location and boundaries of the claim. *Ainsa* v. *United States*, (1895) 161 U. S. 208, 222. But in the case at bar the plaintiff set up a completed grant, surveyed and located by definite boundaries long before September 25, 1853.

The act of Congress of July 22, 1854, c. 103, provided for the appointment of surveyor general for New Mexico, (which then included what is now the Territory of Arizona,) and, by section 8, made it his duty, "under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico;" authorized him, for this purpose, to issue notices, summon witnesses, administer oaths and do all other necessary acts; and directed that he should make a full report, according to a form to be prescribed by the Secretary of the Interior, "on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same, under the laws, usages and customs of the country before its cession to the United States;" that his report should "be laid before Congress, for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of 1848;" and that, "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government." 10 Stat. 308, 309. And by the Sundry Civil Appropriation Act of July 15, 1870, c. 292, it was enacted that the surveyor general of the Territory of Arizona, as to lands in that territory, should have all the powers conferred and perform all the duties enjoined upon the surveyor general of New Mexico by the act of 1854; and that his report should be laid before Congress, for such action thereon as should be deemed just and proper. 16 Stat. 304.

Under those provisions of the acts of 1854 and 1870, it was held by this court that a claim reported by the surveyor general to Congress, and which had been confirmed by Congress, or upon which Congress had not acted, was not within the jurisdiction of the ordinary courts of justice. *Tameling* v. *United States Freehold Co.*, (1876) 93 U. S. 644; *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 80, above cited.

But this court has never decided the question whether a claim under a Mexican grant, which was complete and perfect before the treaty of Guadalupe Hidalgo took effect, and no claim for which was pending either before the surveyor general or before Congress, could be asserted in the ordinary courts of justice while those provisions of the acts of 1854 and 1870 were in force. Nor is it necessary now to consider that question, because those provisions have been superseded and repealed by the act of March 3, 1891, c. 539, establishing the Court of Private Land Claims. 26 Stat. 854.

By section 6 of this act, "it shall and may be lawful for any person or persons or corporation, or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Republic of Mexico, and now embraced within the territories of New Mexico, Arizona or Utah, or within the States of Nevada, Colorado or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition in writing to the said court," which is authorized, after notice to any adverse possessor or occupant, and to the attorney for the United States, and full legal proof and hearing, to enter a decree confirming or rejecting the claim.

By section 7, "all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States;"

and the court is authorized "to hear and determine all questions arising in cases before it, relative to the title to the land the subject of such case, the extent, location and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations," the stipulations of the treaties between the United States and Mexico of 1848 and 1853, "and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States."

By section 8, "any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title, derived from the Spanish or Mexican government, that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court, in the manner in this act provided for other cases, for a confirmation of such title; and on such application said court shall proceed to hear, try and determine the validity of the same, and the right of the claimant thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned." "And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person, as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby."

That section further provides that the United States may "file in said court a petition against the holder or possessor of any claim or land in any of the States or Territories mentioned in this act, who shall not have voluntarily come in under the provisions of this act, stating in substance that the title of such holder or possessor is open to question, or stating in substance that the boundaries of any such land, the claimant or possessor to or of which has not brought the matter into court,

are open to question, and praying that the title to any such land, or the boundaries thereof, if the title be admitted, be settled and adjudicated; and thereupon the court shall, on notice to such claimant or possessor as it shall deem reasonable, proceed to hear, try and determine the questions stated in such petition or arising in the matter, and determine the matter according to law, justice and the provisions of this act, but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant or possessor."

By section 9, either party against whom the Court of Private Claims decides may appeal to this court.

By section 13, all the foregoing proceedings and rights are to be conducted and decided subject to several provisions, among which are the following:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land, and one that, if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect, had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

"Fourth. No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress, or under its authority.

"Fifth. No proceeding, decree or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands."

"Eighth. No concession, grant or other authority to acquire

land, made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant or other authority to acquire land."

The only authority given by this act to the surveyor general of a Territory or State is by section 10, which requires him, after a final decree of confirmation by the Court of Private Land Claims, and under the direction of the Commissioner of the General Land Office, to make a survey and return it to said commissioner, by whom it is to be transmitted to that court for its approval or correction. And section 15 expressly repeals section 8 of the act of July 22, 1854, "and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act."

The effect of these provisions of the act of 1891 is, that all prior acts of Congress providing for the assertion, whether in a judicial tribunal or before a surveyor general and Congress, of either complete or incomplete Mexican grants, are repealed, except as to claims previously acted upon and decided by Congress or under its authority; that all incomplete claims against the United States, coming within the provisions of the act, must be presented to the Court of Private Land Claims; that any one claiming land under a Mexican grant, which was complete and perfect at the time of the cession of sovereignty, "shall have the right (but shall not be bound) to apply to said court," as in cases of incomplete grants; that the United States, however, may file a petition in that court "against the holder or possessor of any claim or land," which would doubtless include titles claimed to be complete, as well as those which were incomplete, at the time of the cession; and that all decisions under this act shall be conclusive between the claimants and the United States only, and shall not affect the private rights of any person, as between himself and any other claimant.

In short, the United States, at their election, may have the validity of any Mexican grant, whether complete or incom-

plete, determined by the Court of Private Land Claims, so far as concerns the interest of the United States; and proceedings to establish against the United States private titles claimed under incomplete Mexican grants are within the exclusive jurisdiction of that court; but the private holder of any complete and perfect Mexican grant may, but is not obliged to, have its validity as against the United States determined by that court; and no rights of private persons, as between themselves, can be determined by proceedings under this act.

The result is that the United States, by the act of 1891, have prescribed and defined the only method by which grants incomplete before the cession can be completed and made binding upon the United States; but have neither made it obligatory upon the owner of a title complete and perfect before the cession to resort to this method, nor declared that his title shall not be valid if he does not do so.

A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the position of one under the peculiar acts of Congress in relation to California; and may be asserted, as against any adverse private claimant, in the ordinary courts of justice.

In the present case, the Mexican grant in question being asserted by the plaintiff to have been complete and perfect by the law prevailing in New Mexico before the cession of the country of the United States; and it being agreed that this grant had neither been confirmed nor rejected by Congress, and that no proceedings for its confirmation were pending before Congress or before the surveyor general at the time of the commencement of this suit; this court, for the reasons above stated, is of opinion that the courts of the Territory of Arizona had jurisdiction, as between these parties, to determine whether the grant was complete and perfect before the cession by Mexico to the United States.

Those courts having held otherwise,

The judgment of the Supreme Court of the Territory of Ari-

zona, affirming the judgment of the district court of Pima County, is reversed, and the case remanded for further proceedings.

MR. CHIEF JUSTICE FULLER dissented.